IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 663.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

CAPITAL TRANSIT COMPANY, ALEXANDRIA, BARCROFT AND WASHINGTON TRANSIT COMPANY, ARLINGTON AND FAIRFAX MOTOR TRANSPORTATION COMPANY, WASHINGTON, VIRGINIA AND MARYLAND COACH COMPANY, ET AL.

BRIEF FOR THE APPELLEE COMPANIES

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW.

The first opinion of the District Court, dated May 1, 1944 (R. p. 913), is reported in 55 Fed. Supp. 51; the second opinion of that Court, dated August 25, 1944 (R. p. 943), is reported in 56 Fed. Supp. 670. The report and order of the Interstate Commerce Commission, dated January 18, 1944, appears in the printed Record at page 835; the supplemental report and order of that Commission, dated June 12, 1944, appears in the printed Record at page 813.

STATEMENT OF THE CASE.

This was a proceeding before the Interstate Commerce Commission instituted upon the complaint* of the Secretary of War into the reasonableness and lawfulness otherwise of fares between the District of Columbia and the Pentagon Building, the Navy Arlington Annex, the Army Air Force Annex at Gravelly Point and the Washington National Airport (R. p. 913). The carriers named as respondents in the proceeding (Appellees here) were the Capital Transit Company, the Alexandria, Barcroft and Washington Transit Company, the Arlington and Fairfax Motor Transportation Company and the Washington, Virginia and Maryland Coach Company. The Secretary of War and the Secretary of the Navy appeared as parties, and the State Corporation Commission of Virginia and others intervened in the proceeding (R. p. 836).

After hearing before one Commissioner and an Examiner, the case was argued before the full Commission, and on January 18, 1944, the Commission issued its report and order, which, among other things, eliminated the five-cent fare of the Capital Transit Company (limiting the fare for the Pentagon trip to the then-existing District intrastate fare), reduced the fares of the other carriers, required the establishment of joint fares between the Virginia carriers and the Capital Transit Company and the use of commutation fares (R. p. 835, et seq.). Thereafter, the carriers filed petitions for reconsideration of the order of January 18, 1944, which were denied by the Commission on February 14, 1944 (Orig. Rec. pp. 1383-1463).

Subsequently appellees filed separate actions in the District Court of the United States for the District of Columbia for injunction under the provisions of the Act of October 22, 1913, 38 Stat. 220. On March 20, 1944 the actions were, by order of the District Court, consolidated for hearing.

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* One of the issues in the case is whether this was a complaint proceeding within the meaning of Section 205(a) of the Interstate Commerce Act. Appellees contend the affirmative (R. p. 10).

After hearing and oral argument, the statutory three-judge court handed down a decision holding invalid the order of the Commission of January 18, 1944, chiefly on the grounds that the carriers were exempt from the provisions of the Motor Carrier Act under section 203(b)(8) and that the Commission had not made adequate findings to support its conclusion that the national transportation policy required the exercise of its jurisdiction (R. p. 913). On May 15, 1944, the court made findings of fact and conclusions of law and entered an order enjoining the appellants from enforcing the order of the Commission of January 18, 1944 (R. pp. 919-922).

In May 1944, pursuant to notice, the Commission held a supplemental hearing in the proceeding and on June 12, 1944, issued a supplemental report and order, affirming its order of January 18, 1944 and establishing the same requirements contained in the latter order (R. p. 813). Thereafter Appellees filed motions in the aforementioned actions in the District Court praying that the injunctive order of the court of May 15, 1944 be amended so as to enjoin the supplemental order of the Commission dated June 12, 1944 (R. p. 923). In the same actions, appellants filed a motion for reconsideration of the order of the court dated May 15, 1944 (R. p. 939). After hearing and oral argument, the court, Mr. Justice Arnold dissenting, on August 25, 1944, rendered its decision holding invalid the order of June 12, 1944 on the grounds that the Commission had erred in deciding that the Appellees were not exempt under section 203(b)(8) of the Motor Carrier Act and that the Commission still had not made adequate findings, and could not make adequate findings on the evidence, that the exercise of its jurisdiction was necessary to carry out the national transportation policy (R. p. 943). On September 20, 1944, the court made findings of fact and conclusions of law and entered an order enjoining the appellants from enforcing the order of the Commission dated June 12, 1944 (R. pp. 949-953).

Appellees presented to the court below eleven separate grounds in respect to each of which they alleged the order of the Commission to be invalid. The court passed upon only the first two grounds, that the Commission was without jurisdiction under Section 203(b)(8) and that it had not made adequate findings. If this Court should disagree with the court below on those two points, the other points must then be considered, either upon this appeal or upon remand for the views of the statutory court.

STATUTES INVOLVED.

The pertinent provisions of the statutes involved appear in the Appendix hereto.

THE FACTS.

The Virginia Installations.

The buildings of the War and Navy Departments, referred to in this case as "the Virginia installations," are the Pentagon Building, the Navy Annex, the Army Air Forces Annex and the National Airport. All are located in Virginia.

The Pentagon Building is located adjacent to U. S. Route No. 1, nearly two miles south of the Virginia end of the Memorial Bridge across the Potomac River, and about one and one-half miles west of the Virginia end of the Fourteenth Street Highway Bridge; the Navy Annex is about two miles south of the Virginia end of the Memorial Bridge and about one mile west of the Pentagon Building; the Navy Annex is reached from the Memorial Bridge over Arlington Ridge Road which does not run by the Pentagon; the Army Annex is on the Mt. Vernon Highway about one and three-fourths miles south of the Virginia end of the Highway Bridge, and the Airport is approximately one-half mile beyond (R. p. 950).

The Capital Transit Company is regularly engaged in the transportation of passengers for hire by streetcar and

bus within the District of Columbia and nearby Maryland. It is temporarily engaged in transportation by bus between two designated termini in the District and the War Department Pentagon Building in the State of Virginia. The Virginia companies, that is, the Arlington & Fairfax Motor Transportation Co., Washington, Virginia & Maryland Coach Company, Inc., and the intervenor, Alexandria, Barcroft & Washington Transit Company, are engaged in the transportation of passengers for hire by bus between points in Virginia in the general vicinity of the District, and between designated termini in the downtown business section of the District on the one hand and points in Virginia, on the other hand; all three of the Virginia companies serve the Pentagon Building; the Navy Annex is served by the Alexandria line and the Arlington line; the Army Annex and the Washington National Airport are served only by the Alexandria line. All of the Appellees operate lines over both the Memorial Bridge and the Highway Bridge. The routes over which the Appellees operate in the District were prescribed by the Public Utilities Commission of the District of Columbia (R. p. 949). None of the Appellees has established through routes or commutation fares on these operations.

Operations of the Capital Transit Co.

The Capital Transit Company did not operate in Virginia prior to the opening of the Pentagon Building. On May 19, 1942, the Company, pursuant to conferences with the War Department, applied to the Interstate Commerce Commission for temporary authority to operate a new interstate passenger bus route from the District to the Pentagon Building (Ex. 61; R. p. 180), for which the Commission granted temporary authority for 30 days (Ex. 62; R. p. 181), and the Company filed a tariff showing a one-way fare between Constitution Avenue and 23rd Street and the Pentagon Building (Route R-2) of 5 cents (Ex. 63; R. p. 181) and on May 30th the Company applied to the Com-

mission for an extension of the temporary authority to December 31, 1944, stating that "the War Department wishes and expects Capital Transit Company to continue this operation during the emergency" (Ex. 65; R. pp. 182, 1048). Thereafter the District terminal was changed "at the instance of the War Department" (Ex. 69; R. p. 183) to 19th and C Streets, the authority was extended to December 31, 1944, and a tariff was filed showing the fare to be 5 cents between the named termini (Ex. 69; R. p. 183). Similarly authority was granted by the Commission for the operation from 7th and Constitution Avenue, via the Highway Bridge, to the Pentagon (Route Q-2), the fares named being a District fare (cash, token or weekly pass) plus 5 cents (Ex. 70; R. p. 183).

These services are carried on during rush hours only and there is no return travel except for some few custodial employees (R. p. 169). Passengers are picked up at the terminals and at other points between the terminals for the interstate trip but not for a local trip (R. pp. 189, 190). Forty-one buses are kept at the Pentagon throughout the day (R. p. 493), since this method saves tire mileage and gasoline (R. pp. 193, 194). Some of the other buses are run to their garages after the Pentagon run, and others are assigned to another run (R. p. 483).

The fares of the Company within the District of Columbia are 10 cents cash, 8⅓ cents tokens sold 3 for 25 cents, and a weekly pass for $1.25, all approved by the Public Utilities Commission of the District (R. p. 461). The distance traveled on Route R-2 is 3.5 miles and on Route Q-2 is 3.6 miles (Ex. 12; R. p. 960). A check made on two days showed that for a 24-hour period the Company carried, inbound and outbound, 19,101 passengers over these routes (Ex. 90; R. p. 1023). On these days 81 different buses were used in the morning and 91 buses in the afternoon (R. p. 479).

The Capital Transit fare to the Pentagon Building was determined after study of the cost and after discussion with representatives of the War Department. The esti-

mated cost per passenger was substantially in excess of 5 cents, but to go along with the wishes of the War Department, the Company fixed 5 cents rather than a higher rate (R. p. 164). The President of the Company discussed the matter of transportation with officials of the War Department before the Pentagon was located at its present site (R. p. 176). He discussed it with General Somervell in August, 1941, and wrote him a letter on the subject on August 26th (R. p. 176; Ex. 56). He told General Somervell that,

> "The results of our studies are very disturbing as to the traffic conditions which will result, even leaving out of consideration very substantial additional cost to this Company in carrying its portion of the traffic. * * * If the Quartermaster Depot site (note: the present Pentagon) is utilized, we would be under the necessity of charging an additional 5-cent fare for a journey to that point, although this would not by any means make up for the additional cost to the Company involved in the transportation to that location as compared with a site in West Potomac Park * * * the conclusion is inescapable that serious congestion and delay will result from the location of either one or two buildings with a total capacity of 30,000 to 40,000 employees, in addition to the Navy Building with its 5,000 which is already under construction."

Neither General Somervell nor any other War Department official protested against the proposal that there would be an additional 5-cent fare (R. p. 177). The President of the Arlington and Fairfax Company attended the conferences with the War Department officials when the location of the new building, eventually the Pentagon, was discussed. The bus companies opposed the location of the building across the River (R. p. 456), telling the Department that the transportation cost and difficulties would be large, that they did not believe that adequate transportation could be supplied (R. p. 456). The subject of fares was discussed and all the conferees were duly apprised of the proposed

fare level (R. p. 456). The chief objective of the War Department then was to increase the service irrespective of cost (R. p. 456). The transportation expert who was the War Department consultant at the time that the equipment for the four installations was being discussed (R. p. 280), testified that at that time there was a desperate need for service and his efforts were directed to obtaining service to get people over to the installations. He urged the companies to put on the service to the Pentagon Building (R. p. 281). There was some discussion of fares at that time, but he did not then express the opinion that the service could be operated from the District on a free tranfef from the Capital Transit Company (R. p. 281).

The Interstate Commerce Commission found that the actual cost per passenger per trip to the Company on the Pentagon operation was 5 cents. It said:

> "In the Departments' computation of operating expenses, certain erroneous basic data admittedly were inadvertently employed. It will be unnecessary to discuss the details. Analysis of the data of record leads us to the opinion that the cost as computed by the Transit Company is somewhat high, while the Departments' figure is too low, and the actual cost per passenger very closely approximates 5 cents" (R. p. 845).

The Commission pointed out that its computation of cost made no allowance for a return on investment.

The fare which the Company charges, and which the Commission would set aside, is 5 cents per passenger per trip.

The fares of the Company beyond the District Line in Maryland are zone fares, fixed by the Maryland Public Service Commission (R. pp. 161, 191). The fare system in Maryland is not completely uniform, but the basic plan is 5 cents cash or a 4-cent ticket for approximately 1½ miles (R. p. 431). A tabulation prepared by the American Transit Association, containing material as to suburban fares in the eastern section of the United States (R. p. 178; Ex. 60, R. p. 1015) gave the zones, rates per zone, average

length of the zones and the average rate per mile of 26 companies. The rates vary from 1.93 cents per mile to 5.56 cents per mile.

Operations of the A. B. and W. Co.

The Alexandria, Barcroft & Washington Transit Company, herein sometimes called the A. B. & W., is the only respondent which serves each of the federal installations in Virginia. This company operates bus service between 12th and Pennsylvania Avenue in the District of Columbia and the federal installations in Virginia, as well as various other points in Virginia. It also is engaged in the transportation of intrastate passenger traffic within Virginia. Its standard fare between points served by it in the District of Columbia and the federal installations is ten cents per passenger per ride. It also sells a book for $1.95 which is good for 26 rides between the Army Air Force Annex at Gravelly Point and points served by it in the District of Columbia. Its intrastate fare between the Navy Annex and the Virginia side of the Memorial Bridge is five cents. For the convenience of the passengers and at the request of the Navy Department, passengers to and from the Navy Annex are actually picked up and carried to the Lincoln Memorial without an additional charge over and above the intrastate fare of five cents for this service (R. pp. 499-519).

The A. B. & W. has complete intrastate rights over its entire system within Virginia. It has intrastate rights in the District of Columbia. For example, it may pick up passengers on trips to the District at any stop south of Maine Avenue and carry them to a point north of that Avenue. On the outbound trip, it may pick up passengers at points north of Maine Avenue and carry them to points south of that Avenue. For this intrastate District service the Company charges a ten cent fare. At one time, the company had a five cent fare for service between the Bureau of Engraving and Printing and 12th and Pennsylvania Avenue, but by order of the Public Utilities

Commission of the District of Columbia of April 16, 1932, this fare was increased to ten cents (R. pp. 499-519).

Within Virginia the fares of the Virginia companies to and from points lying beyond these installations are fixed on a zone basis, those of the Alexandria line, for example, extending in a series of 5-cent zones to a maximum of 35 cents at Fort Belvoir, Va. Between the Pentagon and the Navy Annex a 5-cent fare applies;, and a 5-cent fare between Rosslyn, Va., and the Pentagon and Navy Annex is likewise maintained by the Arlington line, the only carrier rendering this service (R. pp. 837-839).

The A., B. and W. is regulated by the Virginia Corporation Commission as to all of its operations within Virginia and by the Public Utilities Commission of the District of Columbia as to all of its operations within the District.

Operations of the Arlington & Fairfax Motor Transportation Company.

The Arlington & Fairfax Motor Transportation Company operates throughout the central part of Arlington County, Virginia, and in and out of the District of Columbia (R. p. 444). So far as the installations involved in this proceeding are concerned, the fare structure is 10 cents from any point on the line. The company has a 5-cent fare from Rosslyn to the Pentagon and to the Navy Building, from the intersection of Lee Boulevard and Washington Boulevard to the Navy Building, and from the Navy Building to the Pentagon Building. From the District of Columbia to all points along its line, the fare is 10 cents. Originally this latter fare was 15 cents, filed with the Interstate Commerce Commission. In the spring of 1933 the company reduced the rate to 10 cents (R. pp. 444-5). The company operates 54 buses and has approximately 40-odd miles in the system (R. p. 447). It operates intrastate service in Virginia and in the District (R. p. 447).

The Arlington and Fairfax is regulated by the Virginia Corporation Commission as to all of its operations within

Virginia and by the Public Utilities Commission of the District of Columbia as to all of its operations within the District.

Operations of the Washington, Virginia & Maryland Coach Company.

The Washington, Virginia & Maryland Coach Company operates in Arlington County, Virginia, and in Fairfax County to points such as Falls Church and Fairfax, and into a terminal at 11th and E Streets in the District of Columbia. It serves the Pentagon Building under temporary authority for rush-hour service only. Its fare from the District of Columbia to the Pentagon Building is 10 cents, which is the same fare charged to other Virginia points within the same zone. The rate was filed with the Virginia Commission and with the Interstate Commerce Commission (R. pp. 437-9). This zone fare was originally 15 cents and was reduced by the company to 10 cents during the depression (R. p. 441).

Except as above-noted, the Virginia companies have never instituted commutation fares or fares for multiple trips. None of them has ever made an arrangement, express or implied, for through routes in conjunction with Capital Transit.

Negotiations with O. D. T. and Others.

In September, 1942, the Appellee Companies began a series of conferences with the Washington Regional Committee of the Office of Defense Transportation. This Committee was composed of a representative of the O. D. T., the Director of Vehicles and Traffic for the District of Columbia, an attorney who represented the State of Maryland, and a representative of the Public Roads Administration, who acted as secretary of the Committee. This Committee was concerned primarily with ways and means of bringing about greater utilization of the existing facilities for the transportation of passengers by motor vehicle between

points in the District of Columbia and points in Virginia. After several meetings with the Committee had been held, it advised Appellees that the War and Navy Departments had complained that the cost of transportation for its personnel between the federal installations involved and points in the District of Columbia are excessive. Although recognizing that it had no authority or duties in connection with the question of fares, the Committee nevertheless acted as a sort of negotiating medium between the War and Navy Departments and Appellees in an effort to satisfy the claims of those departments and incidentally establish a system of fares which might have the effect of a more even distribution of the traffic and thereby improve the utilization of the bus equipment (R. pp. 177, 458).

In October, 1942 the Regional Committee suggested that the Virginia bus companies establish a joint ticket fare of fifteen cents per ride in conjunction with the Capital Transit Company good between all points in the District of Columbia and the federal buildings in Virginia already described (R. p. 177). All of the Appellees acquiesced in this request after conferences and discussions among themselves; but by that time the Regional Committee had reached the conclusion that fifteen cents was not an appropriate fare as they felt that the Army and Navy would not be satisfied with that fare and requested that the Appellees institute a joint fare of 14-1/6 cents per ride. However, before this suggestion was acted upon the Regional Committee again changed its mind and requested that a joint fare of 13⅓ cents be established (R. pp. 177, 458). The latter proposal was considered by the Companies at various times and on March 9, 1943, they addressed a letter (Ex. 59; R. p. 1012) to the Regional Committee in which they agreed to establish the joint fare of 13⅓ cents per one-way trip under the conditions outlined in that letter, the details of which need not be stated here (R. p. 177).

Meanwhile and before that letter was written, Senator Burton of the District Committee of the Senate arranged a

a conference with the interested companies at which he suggested the advisability of selecting a third authority to survey the entire situation and make recommendations. As the result of the suggestions made at that conference, Mr. W. Y. Blanning, Director of the Bureau of Motor Carriers of the Interstate Commerce Commission made a survey. A copy which contains the recommendations of Director Blanning, was introduced of record as Exhibit 57 (R. p. 999). He recommended, among other things, that the Appellees establish a joint ticket arrangement consisting of a book of twelve trips to be sold at $1.60 per book, which is the equivalent of 13⅓ cents per ride or trip. He also recommended that the use of the five cent intrastate fare of the A. B. & W. from the Navy Annex to passengers discharged or picked up at Lincoln Memorial, and the five cent fare of the Washington, Virginia & Maryland Coach Company between the Pentagon Building and Rosslyn, be eliminated.

The War and Navy Departments declined to approve either the suggestion of the Regional Committee or the recommendations of Director Blanning.

Thus it will be seen that these protracted efforts to bring the negotiations to fruition came to naught.

Employees at Virginia Installations.

Statistical data as to employees at the War and Navy Departments consisted, first, of data as to salary classifications (Exs. 21, 22), the first being the percentages of War Department employees by service and grade, and the second being based on a sample of 184 cases, said to be a representative sample (R. p. 71). There are twenty-odd thousand civilian personnel at the Pentagon Building (R. p. 71). The second part of this data was based on a questionnaire, a sample of which is Exhibit 33 (R. p. 979), which was distributed to personnel at the War and Navy Departments and which asked for data as to transportation used getting to and from work, and as to fares and time spent in traveling. From the returns to these questionnaires officers in

the Departments made tabulations (Exs. 12, 13, 17, 18, 19; R. pp. 960, 961, 964, 965 and 966), which these officers testified showed the comparative distances traveled, an analysis of the use of passes of the Capital Transit Company; an analysis of one-way trans-Potomac fares and an analysis of passengers carried and fares paid by Pentagon employees. Exhibit 13 (R. p. 961) purported to show that the average distance traveled from an employee's residence to the Pentagon Building by Route R-2 was 6.12 miles and by Route Q-2 6.52 miles. Exhibit 14 (R. p. 961) showed that there were 32,132 employees, civilian and military, at the Pentagon in May, 1943, and 30,993 in July, 1943. Exhibit 19 (R. p. 966) showed that out of 28,916 passengers who traveled to the Pentagon Building on a sample day, 9,793 used the Virginia companies, paying a 10-cent fare, and 19,123 used the Capital Transit, paying a 5-cent fare.

I. C. C. Order of January 18, 1944.

On January 18, 1944, after argument before the full Commission, the Interstate Commerce Commission issued its report and order (R. pp. 835 et seq.).

The Commission divided (R. pp. 836, 851, 852, 853, 854, 856); four Commissioners joined in the majority finding; two concurred in the report; one concurred in the majority finding; one dissented in part; and two, including the Commissioner who heard the case, dissented.

The majority ordered that the Capital Transit Company carry people from any point in the District to the Pentagon Building for no fare in addition to the District fare, that all the companies establish a joint fare on a through route at 13⅓ cents; and that the Virginia company fares be 10 cents cash or 3 tokens for 25 cents (R. pp. 850-1).

Two of the Commissioners concurred in the report of the Commission and said that it was very important that the jurisdictional questions which are raised should be determined; they said that they were not satisfied with the findings of the Commission and that to require 8⅓ cents for

a part-way haul by the Virginia companies over the same route, or to put it another way, an 8⅓-cent fare over the whole route for the Capital Transit Company and 13⅓ cents over the same route on the lines of the other companies, "seems to lack something in reasonableness." These two Commissioners would have established a 10-cent fare on all companies between any point in the District to the Virginia installations. One Commissioner concurred in the findings of the majority and said that his idea was quite simple, that all the Virginia installations ought to be included in the base zone which now consists of the District of Columbia. Another Commissioner dissented in part. He said that he would find 13⅓ cents a reasonable fare for all the companies. Two Commissioners, including the Commissioner who heard the case dissented. The Commissioner who heard the case said that the Commission was without jurisdiction over street railways, and that this case would set a precedent on the point that the Commission could order a fare for the street railway system. He said that the Commission had no authority to require commutation tickets, and that he would have found a reasonable joint single-trip fare of 15 cents; that if the Commission had the power to require commutation tickets (he believed that they had no such power), he would have approved the token fares prescribed for the Virginia companies (R. p. 855). This Commissioner also said that he would not extend the District of Columbia fares. His words in that regard were that it was "an unwarranted enlargement" of the District fare zone, and that it was "an unjustifiable extension" of the District intrastate basis of fares. Again he said that the order of the majority would require the company to perform an extended service involving considerable cost without any compensation whatsoever; that the order of the majority unduly preferred one group of patrons to the detriment of the others; that the fare for Capital Transit passengers was about 60 per cent of what the patrons of

the other companies would pay, remarking that "there is and can be no justification for such disparity." Finally he said that the order was without lawful authority, that the fares prescribed were unreasonably low, that the order was unduly preferential and might well bring about a deterioration, if not a complete discontinuance, of the service.

The order was to be effective March 13, 1944, and the Appellees were required to file and post schedules of the new fares fifteen days prior to that date. On February 14, 1944, the Commission denied applications of the Appellees for reconsideration and vacation of the order.

Order of the District Court.

Appellees brought action before the District Court of the United States for the District of Columbia, praying that the order of the Commission of January 18, 1944, be set aside as null and void (R. pp. 828, 858, 869, 877), the A., B. & W. Company intervening (R. p. 885). After hearing, the statutory three-judge court, composed of Associate Justice Miller of the United States Court of Appeals of the District of Columbia and Associate Justices Bailey and Letts of the District Court of the United States for the District of Columbia, rendered a unanimous opinion (R. p. 913), findings of fact and conclusions of law (R. p. 919), and issued its order granting a permanent injunction against the order of the Commission of January 18, 1944 (R. p. 922).

Supplemental Report of the Commission.

The Commission, taking notice of the opinion of the District Court, reopened the proceeding for further hearing and reconsideration (R. pp. 772, 775). Thereafter, further hearing was held (R. pp. 776-813) and the Commission issued a supplemental report (R. 813) and an order dated June 12, 1944, in which the Appellees were required to establish fares which would not exceed the fares found reasonable in the report of the Commission dated January 18,

1944 (R. p. 827). Commissioners Patterson and Miller dissented (R. pp. 825-6). In its supplemental report, the Commission found that the transportation involved is not excluded from the application of the Interstate Commerce Act by Section 203(b)(8) thereof, and that the application of the Act to this transportation is necessary to carry out the national transportation policy, and it affirmed the findings and conclusions in its prior report (R. p. 825). In this report, the Commission gave consideration to the decision of the District Court on two points, (1) the removal of the commercial zone exemption (Section 203(b)(8) of the Interstate Commerce Act) and (2) the extent to which Appellees are engaged in intrastate transportation. On the first point, the Commission found that the Virginia installations "may be characterized as the nerve center of the war effort in this country" (R. p. 818), and said:

> "It is clear that in order to ensure for the transportation here considered fares that do not exceed a level operating against the full efficiency of the important services performed at the Virginia installations in the conduct of the war, it is essential that the fares be subjected to regulation. As above said, it is considered and has been shown that the existing fares are having an effect detrimental to such services, and there can be no assurance against the charging of excessive fares except by subjecting them to regulation." (R. p. 819.)

It further held, contrary to the finding of fact of the District Court, that the Capital Transit Company "is not engaged in any intrastate operations in Virginia, either authorized, or unauthorized, by that state, over its interstate routes between the Pentagon and the District" (R. p. 821). It found that the W., M. & V. Company is not engaged in any intrastate operations in the District of Columbia over its interstate routes between the Pentagon and the District (R. p. 821). It further found that the A., B. & W. and the Arlington & Fairfax lines are not authorized to engage in any intra-District transportation over their Memorial

Bridge routes and that over their Highway Bridge routes, "they are also not authorized to engage in such transportation, except between authorized stopping points * * *" (R. p. 821), concluding:

> "We are of the opinion that the said lines are not engaged in intrastate transportation, either authorized, or unauthorized, by the District, over the entire length of their interstate routes herein involved." (R. 822.)

Further Order of the District Court.

Thereupon appellees applied to the District Court for an amendment of the language of the injunctive order of the court (R. 923), and after hearing, the statutory three-judge court, Mr. Justice Arnold of the United States Court of Appeals for the District of Columbia sitting in the place of Mr. Justice Miller, issued its opinion (R. p. 943) and findings of fact and conclusions of law (R. p. 949), Mr. Justice Arnold dissenting, and issued its order setting aside and permanently enjoining the order of the Commission of June 12, 1944 (R. p. 952).

SUMMARY OF THE ARGUMENT.

The basic effects of the Commission's orders are:

1. The present interstate operations of these bus companies are between the Virginia installations and designated downtown termini in the District. The Commission attempts to treat the operations as beginning, or ending, at any point in the District of Columbia at which the passenger may initially board a street car or bus, or may finally alight therefrom.

For example, a passenger who wants to go from 14th and Park Road to the Pentagon uses a Capital Transit street car from 14th and Park Road to a downtown point; he then boards a Pentagon-bound bus of some one of the companies and pays a new fare. There are no through routes or arrangements for through carriage. At present

the interstate operation of the companies begins and ends at the termini. The Commission would make it begin and end at 14th and Park Road, in the example cited.

2. In respect to the Virginia companies, the Commission would reduce their fares from the Virginia installations to the downtown termini, from 10 cents cash, by requiring them to sell tokens three-for-a-quarter, but without disturbing the 10-cents cash fare.

3. As to the Capital Transit Company, the Commission would expand the District of Columbia so as to include the Pentagon Building. The Commission says quite frankly that this is the basic idea in its treatment of that company. The District fares are fixed by the Public Utilities Commission of the District, and are 10 cents cash, tokens at 8⅓ cents or a weekly pass costing $1.25.

4. The Commission directed that books of twelve one-way tickets be sold for $1.60 (which is 13⅓ cents per trip), good for a trip between any point in the District and any of the Virginia installations via the Capital Transit in conjunction with any one of the Virginia companies. Thus the total effect of the orders is that the fare to and from the Pentagon is 13⅓ cents if the passenger goes part way via a Virginia company but 8⅓ cents or less if he goes all the way by Capital Transit.

In the Court below Appellees presented, seriatim, numerous objections to the validity of the orders of the Commission, maintaining that any one objection, if sustained, was fatal to the orders. The court below passed upon only one jurisdictional point. It held that the Commission had no jurisdiction because this is urban mass transportation, as the Commission itself said, and it was not the intention of Congress to confer jurisdiction on the Commission to regulate fares for transportation of that nature. The court held (1) that these operations are wholly within a commercial zone already established by the Commission, (2) that the companies are lawfully engaged in the intrastate trans-

portation of passengers over the entire length of their interstate routes (R. pp. 920-21), (3) that regulation by the Commission is not necessary to carry out the national transportation policy, and (4) that the effect of the Commission's order is to regulate fares for intrastate transportation in violation of the statute (R. pp. 915-16). The court further held that the Commission had made no findings, and could make no findings on the evidence, to sustain a conclusion that its jurisdiction was necessary to carry out the national transportation policy.

Section 203(b) (8) of the Interstate Commerce Act[1] specifically provides that,

> "* * * nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part * * * apply to: * * * (8) the transportation of passengers or property in interstate or foreign commerce wholly * * * within a zone adjacent to and commercially a part of any such municipality * * *, provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each state having jurisdiction: * * *."

It is undisputed that the transportation here involved lies entirely within the Washington commercial zone as fixed by the Commission. 3 M. C. C. 243. Two of the carriers here involved are unquestionably engaged in intrastate transportation of passengers over the entire length of their lines. Appellees contend, and the court below found, that the other carriers are likewise so engaged, and that, in any event, the order of the Commission is a unit and applies uniformly to all the carriers here involved. Local urban

[1] The Motor Carrier Act is Part II of the Interstate Commerce Act, being an amendment thereto by an Act of August 9, 1935. Section 203(b)(8) is 49 Stats. 543; 49 U. S. C. A. 303(b)(8).

mass transportation does not involve the national transportation policy, which, according to the statute, is concerned with a *national* transportation *system*.

The argument of Appellees in respect to the second point is that the findings of fact made by the Commission, even if valid on the evidence, were inadequate to support the conclusion that regulation by the Commission is necessary to the national transportation policy. The findings were that the employees at the Virginia installations are doing important war work, that most of them are in the low income group, that they are dissatisfied with the bus fares and that, in the opinion of the Secretaries of War and Navy, such dissatisfaction impedes the war effort. No findings were made, or could be made, that the fares were high for the service rendered; in fact, the Commission specifically found that the actual cost to the Capital Transit Company, without any return on the investment, was 5 cents per passenger per trip, and the fare of that company is only 5 cents per passenger per trip; the Commission made no findings as to any other costs. No findings were, or could be, made that the fares yielded an excessive return to the companies, or that the service rendered was inadequate or not satisfactory. Appellees contend that it would be an amazing and novel doctrine if it be held that where the intra-zone customers of a bus company are engaged in important work in commerce, or the postal service, or national defense (these three being mentioned with equal emphasis in the definition of the national transportation policy), and such customers are underpaid, and they are "dissatisfied" with the bus fares, and their employer is of the opinion that their dissatisfaction impedes their work, such facts alone are sufficient to invoke federal regulation under the terms of the Interstate Commerce Act.

The Company Appellees will discuss the foregoing two points, but they rely also upon the brief and argument presented upon these points by the Appellee State Corporation Commission of Virginia.

If the Court should concur in the opinion and decision of the court below upon either or both of the forgoing two points, consideration of the case is at an end. If, however, the Court be of the contrary view on both of the foregoing points, it will be necessary to consider the remaining contentions of Appellees, not discussed by the court below. Appellees respectfully urge that such consideration be had upon a remand to the District Court for its views. However, since Appellants have discussed some of the points in their brief, Appellees must state here their views in the same respect.

The other points are:

(a) Section 216(e) of the Interstate Commerce Act[2] provides:

> "That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

The Commission is thus categorically denied authority to prescribe or regulate for any purpose whatever any fare for intrastate transportation or any service connected with intrastate transportation. In attempting to direct that the District of Columbia fares of the Capital Transit Company be extended to cover transportation to the Pentagon Building without any additional charge, the Commission is clearly attempting to regulate the service connected with those intrastate fares.

(b) The Commission assumed, without any evidence to support the assumption, that through routes now exist between the Virginia bus lines and the Capital Transit Company.

(c) The authority of the Commission to prescribe joint fares and through routes is limited by Section 216(e) of

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[2] 49 Stats. 558; 49 U. S. C. A. Sec. 316(e).

the Act to through routes and joint fares of common carriers of passengers by motor vehicle.

(d) The Commission is without power to determine the reasonableness of through fares of one or more carriers unless through routes have been voluntarily established. Even where through routes have been voluntarily established, the authority of the Commission to prescribe *joint* fares is limited to motor common carriers of passengers. (Sec. 216(c))

(e) The Commission is without authority, under the statute, to order joint fares between a motor carrier and an electric street railway.

(f) The Commission is without authority to direct and order commutation fares when the carriers have not voluntarily established such fares.

(g) In ordering that the fare over Capital Transit lines from the Pentagon Building to points in the District of Columbia be at District of Columbia rates (cash 10 cents, tokens 8⅓ cents, pass $1.25 a week), but that the fares for the same trip, over the same routes and with the same service, in part over the lines of the Virginia companies and in part over the lines of the Capital Transit Company, be 13⅓ cents, the Commission was illegally discriminatory between passengers and between the companies.

(h) There is no evidence, substantial or otherwise, to support the findings of the Commission that the employees at the Virginia installations are dissatisfied with the bus fares or that the fares impede the war effort. On the contrary, the evidence affirmatively proves the absence of such dissatisfaction.

(i) Even if the Commission had jurisdiction, and even if its findings as to the dissatisfaction of employees and the importance of the work being done at the Virginia installations were valid findings, they do not constitute a legal basis for a reduction of bus fares. Transportation rates cannot be fixed by regulatory authority upon the sole basis of the satisfaction or dissatisfaction of specific groups of

customers, without some foundation in fact as to an excess of fares above the value of the service rendered or above a fair return to the company.

(j) This proceeding should have been referred by the Commission to a Joint Board, in accordance with Section 205(a) of the Interstate Commerce Act,[3] the instant proceeding being a "complaint" matter within the meaning of the statute. On this point, the Company Appellees rely upon the argument and brief of the Appellee State Corporation Commission of Virginia.

(k) The finding of the Commission that the fares of the Appellees are unjust and unreasonable is not supported by the evidence, is contrary to the evidence, and is arbitrary and capricious.

ARGUMENT.

I.

The Commission Does Not Have Jurisdiction Over the Operations Here Involved.

The decision of the court below was predicated upon a jurisdictional issue which Appellees view as involving, among others, the following points:

(a) The Commission does not have jurisdiction over intra-terminal transportation, *as such*, under any section of the Act.

(b) The Commission cannot, under the facts in this case, acquire jurisdiction over intra-terminal transportation, as such, by reference to the National Transportation Policy.

By intra-terminal operations, we refer to transportation which originates and terminates wholly within a single community, such as the commercial zone of Washington,

[3] 49 Stats. 548; 49 U. S. C. A. Sec. 305(a).

D. C., as prescribed by the Commission in 3 M. C. C. 243. By intra-terminal transportation, as such, we refer to transportation which is physically performed within a single community, and in addition to that characteristic, such transportation has no connection directly or indirectly with any prior or subsequent transportation to or from any point beyond the single community.

Local cartage for local merchants and local transportation of passengers are examples of intra-terminal transportation, as such. "Pick-up and delivery" or "door to door", transportation by railroads, express companies, line-haul motor carriers and water carriers, are examples of segments of transportation which are physically local but are in fact, and under the Interstate Commerce Act, merely the continuation of line-haul transportation to or from points beyond commercial zones. Such transportation is subject to the Commission's primary jurisdiction where there is an arrangement for continuous carriage to or from points beyond a commercial zone and was not exempted under Section 203(b)(8).

But a line-haul carrier may own or control a local carrier and may perform local service without a tariff arrangement for continuous carriage, and if and when a line-haul carrier so operates the local transportation agency or any other activity so as to defeat any of the provisions of the Act, then the Commission may exercise its secondary jurisdiction to enforce the Act consistent with its specific provisions and the National Transportation Policy.

Recapitulating, we contend that the jurisdiction of the Commission is, in every conceivable circumstance, bottomed on jurisdiction over a line-haul carrier or by virtue of common control management or an arrangement for continuous carriage to or from a point beyond a commercial zone. Jurisdiction of the Commission can never arise out of a local activity which is unconnected directly or indirectly with transportation beyond the local area. The Commission has

long exercised its secondary jurisdiction under appropriate circumstances[4] and this Court has consistently approved.[5]

(a) *The Commission Does Not Have Jurisdiction Over Intra-terminal Transportation, As Such, Under Any Section of the Act.*

Historically Congress has avoided intrusion in the domain of local affairs and has departed from this policy only in the light of demonstrated necessity. This Court has consistently given recognition to that legislative policy.

This Court has held the Commission to be without jurisdiction over local affairs even though interstate commerce across state lines was involved and the literal provisions of the Act were broad enough to confer jurisdiction over the local subject matter.

The Act of 1887 gave the Commission jurisdiction to regulate railroads. The Commission in 1909 concluded that street-railways came within the sweep of the term "railroad" and thereupon undertook to regulate interstate street railway fares between Omaha, Nebraska and Council Bluffs, Iowa. In 1912, this Court reversed the Commission on the jurisdictional question, which was determined by reference to the intent of Congress.[6]

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[4] Washington, D. C.—Store Door Delivery, 27 I. C. C. 347
Baltimore, Md.—Store Delivery, 30 I. C. C. 388
Tariff—Motor Truck or Wagon Trans., 91 I. C. C. 539
Constructive and Off-Truck Freight Stations, 156 I. C. C. 206
St. Louis Transfer and Drayage, 177 I. C. C. 316
Coordination of Motor Transportation, 182 I. C. C. 263.

[5] Ellis v. I. C. C., 237 U. S. 434, 59 L. ed. 1036
Baltimore & Ohio R. Co., 305 U. S. 507, 83 L. ed. 318.

[6] Omaha Street Ry. v. U. S., 230 U. S. 324, 57 L. ed. 1501 wherein the Court said:

> "If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the

In the present case the dissenting members of the Commission recognized the similarity of issues presented by the present case, with those which were involved in the *Omaha* case, *supra*, and said (R. p. 854):

> "An urban or suburban street railway is local and for the use of a single community even though that community is divided by a state line * * *".

The principle remains the same, regardless of the fact that a local street railway may operate both street cars and street buses.

The exercise of federal jurisdiction in derogation of state and local powers is seldom if ever implied.[7] When, in 1935, Congress enacted the Motor Carrier Act (now Part II of the Interstate Commerce Act) it went unusually far in specifically preserving local jurisdiction over local matters.[8]

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companies' own property. The tracks extend from town to town, and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by state lines, or under different municipal control. When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887".

[7] City of Yonkers v. U. S., 320 U. S. 685, 88 L. ed. 241, 245:

"Proper regard for the rightful concern of local interests in the management of local transportation facilities makes desirable the requirement that federal power be exercised only where the statutory authority affirmatively appears."

[8] Sec. 203(b)(8), Exemptions of numerous local operations.
Sec. 204(a)(4a), Exemption of physically intrastate operations.
Sec. 206(a), State certificates for physically intrastate operations.
Sec. 216(e), "Provided however, That nothing in this part shall empower the Commission to prescribe or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

Despite the sweeping and inclusive directions and powers to regulate motor carrier facilities and services and to develop economical and safe transportation, without discriminations or preferences, which are embodied in Part II of the Interstate Commerce Act, this Court held that the police power of South Carolina was unimpaired and that the Interstate Commerce Act could not, by implication, be construed as an exercise of federal power in derogation of state powers, regardless of how burdensome or destructive the exercise of state powers might be.[9]

By Section 203 (b) Congress specifically provided numerous exemptions, some absolute and others conditional, and generally these exemptions related to local transportation. The provisions of Section 203 (b) (8) provided certain qualified and conditional exemptions for transportation within a municipal area or a commercial zone.[10]

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[9] South Carolina v. Barnwell, 303 U. S. 177, 82 L. ed. 734. In that case South Carolina limited the width of trucks to 90 inches despite the fact that every other state in the Union permitted a width of 96 inches and all trucks used in the movement of commerce were 96 inches wide.

[10] Sec. 203(b): "Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * *

(7a) * * * nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to:

(8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction."

Testing the asserted jurisdiction of the Commission by the facts in this case, which involve nothing but local matters, Appellees contend that there is nothing to support such jurisdiction and the Commission has made no findings which can possibly support conditional jurisdiction, or stated another way, support removal of the exemption.

To qualify for the exemption under Section 203 (b) (8) there must *not* exist "a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone * * *." In this case and as between the motor carriers and street railway here involved there is no "common control, management, or arrangement for a continuous carriage" beyond the commercial zone. So the Appellees qualify for the exemption under that test.

But grounds for jurisdiction, under paragraph (8), are said to arise from the further provision requiring passenger carriers to be engaged "in intrastate transportation of passengers over the entire length of such interstate route".

The provisions of Sec. 203(b)(8), if applicable under any circumstances to mass transportation within a commercial zone, nevertheless qualify and condition the jurisdiction of the Interstate Commerce Commission in clear and unambiguous terms insofar as two of Appellees here are concerned. The Interstate Commerce Commission can never have jurisdiction if the local carrier operating within a commercial zone is engaged in intrastate transportation over the entire length of its interstate route. The Arlington and Fairfax Transportation Company conducts its entire operation within the commercial zone of Washington, D. C., and is engaged in the intrastate transportation of passengers over every inch of its lines in both Virginia and the District of Columbia (R. p. 447) and the Alexandria Barcroft and Washington Transit Company is also engaged in intrastate transportation over every inch of its lines in Virginia and the District of Columbia (R. p. 500). Although some of the lines of the latter company extend

somewhat beyond the commercial zone, the transportation here involved is wholly within that zone.

In the exercise of their respective jurisdictions, the Commissions of Virginia and the District restrict or specify the points at which passengers are to be picked up or discharged, which is in effect both a restriction and the imposition of a duty. The Interstate Commerce Commission seeks to distinguish between intrastate transportation over the entire length of the interstate route and the points at which passengers may board or leave the buses. Here, intrastate transportation is actually required and performed over the entire length of the route and the regulation of the local Commission fixing the stops does not concern the Interstate Commerce Commission. The local Commissions can and do change their requirements as to stops from time to time, and without consulting the Interstate Commerce Commission, and they act independently, on authority of local law and regulation. Obviously the asserted jurisdiction of the Interstate Commerce Commission cannot stand on such tenuous construction of the statute nor on the momentary effective orders of the state Commission over which it has no control whatever. While the Interstate Commerce Commission has argued jurisdiction on such grounds, nevertheless it has recognized the weakness of its position and concluded with another equally untenable assertion of jurisdiction under the Transportation Policy and with reference to "national defense".

The fact that the Interstate Commerce Commission has assumed jurisdiction over all of the carriers, including two which are clearly engaged in the intrastate transportation of passengers over the entire length of their routes, indicates that the Commission did not base its asserted jurisdiction entirely on that qualifying provision of Section 203 (b) (8).

Before laying aside the provisions of Section 203 (b) (8) having to do with the intrastate transportation of passengers, it will be appropriate to refer to the legislative history

of that qualification to the general exemption. That qualification was a committee amendment to S. 1629, which became the Motor Carrier Act of 1935. The bill as originally drawn contained the present general exemptions for transportation "wholly within a municipality or between contiguous municipalities, or within a zone adjacent to and commercially a part of any such municipality or municipalities." It also contained the exception to the exemption, having to do with common control and arrangements for transportation beyond the commercial zone.

Certain operators of bus lines in New Jersey, serving areas adjacent to Philadelphia and New York City, viewed the exemption within undefined commercial zones as possibly permitting exempt transportation for great distances from Philadelphia and New York City, because of the presence of numerous contiguous municipalities and the extensive commercial zones claimed by Chambers of Commerce.[11] They opposed exemptions for distances of 50 miles or more from these cities. Therefore they proposed the qualification providing that the bus lines should hold intrastate rights before the interstate exemption should become operative.[12]

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[11] New York Commercial Zone, 1 M. C. C. 665, 2 M. C. C. 191.

[12] Hearings before Senate Committee on Interstate and Foreign Commerce, S. 1629, Feb. 25 to March 6, 1935, pages 208-216:

"The Chairman. Of course if you wanted to leave out passenger traffic, you could merely amend it by saying transportation of property by trucks.

"Mr. Wakelee. That would satisfy me and satisfy the kind of operations I speak about but it would not satisfy some other situations. While the amendment suggested by the chairman was the amendment I first intended to suggest, I have been informed there are situations with respect to the carrying of passengers where some exception might well be made. I refer particularly to Kansas City. That is a city lying on both sides of a State line, of course, two cities in name but one practically, and the rail carriers, the street railways, run indiscriminately across the State line. And they are substituting on some of those lines busses for the street railway. Those busses do an intrastate business in both cities. They are regulated

Neither the proponents of this amendment nor Congress contemplated the application of the proposed condition in connection with purely intra-terminal operations, even though such operations cross a state line and that is shown by the legislative history.

Consideration was given to entirely eliminating bus transportation from the general exemption under Section 203 (b) (8). Had that been done, it would have accomplished the same results reached by the Commission through literal interpretation of the intrastate condition and resulted in no exemption for two of Appellees. But the proposal to eliminate bus transportation from the general exemption provided by Section 203 (b) (8), was laid aside because it was not intended or desired to reach purely local or intra-terminal transportation. This purpose and objective was made clear by the illustrations presented to the Senate Committee. It was not the intention to remove or qualify the exemption for such local transportation as might flow across a state line, between such points as Kansas City, Missouri, and Kansas City, Kansas. That was local transportation which was not to be affected by the proposed amendment. The purposes of the exemption as finally provided in Section 203 (b) (8) were explained to the Senate by Senator Wheeler.

> "An exemption is made, unless the Interstate Commerce Commission finds that the law cannot be made to work without its inclusion to some extent, of the transportation of property locally or between contiguous municipalities or commercial zones, as between New York City and New Jersey, and also for instance, as between *Washington, and Alexandria*, and other contignous cities *where the transportation is regulated by*

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by both States. They are in an entirely different position from where an operator does a purely interstate business which cannot be regulated by a State. Therefore the amendment I am going to present to you will exclude such operations from the bill, in metropolitan areas as well as the transportation of property". (Page 212)

the local Governments themselves." (Emphasis ours) 79 Cong. Rec. 5650.

"Provision is also made that regulation shall not apply to what may be termed 'intramunicipal' or 'occasional' operations 'unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202'. The first of these two conditional exemptions concerns the transportation of passengers or property in interstate or foreign commerce within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is part of a continuous carriage or shipment to or from a point without such local area. The Committee has added an outright exemption of the operations of carriers of passengers in such local areas where such carriers of passengers are also lawfully engaged in the intrastate transportation of passengers over the entire length of their interstate route or routes in accordance with the laws of each State having jurisdiction.

"At the present time some are regulated by each State. For instance, as between New York and Jersey City, if they are regulated by the State of New York and by the State of New Jersey, then they are exempt from the provisions of the bill. *But if there is no regulation of their operations in either State*, then the Commission would have the right to regulate them.

"*The purpose of this exemption is to avoid duplication of regulation over bus operations*, such as those conducted by street railways, however, the Commission is authorized to take jurisdiction, where necessary, over buses operated within a municipality or between contiguous municipalities by motor carriers in interstate service *and not so regulated by the States. The absence of such regulation has in some instances created chaotic conditions beyond the control of any State or municipal body.*" (Emphasis ours) 79 Cong. Rec. 5651.

The Commission is without jurisdiction over the intraterminal transportation here involved for the reason that

such transportation is not within the general policy of Congress in such matters.

Whatever may have been the fears with respect to unregulated transportation, in extensive undefined commercial zones, such issues were settled by the Commission when it prescribed a very restricted commercial zone for Washington, D. C. The Commission cannot be so inconsistent as to leave outstanding its order in *Washington, D. C. Commercial Zone*, 3 M. C. C. 243, and then ignore it and issue contrary orders in this case, without notice to the parties that the commercial zone area was to be re-examined.

(b) *The Commission Cannot, Under the Facts in This Case Acquire Jurisdiction Over Intra-terminal Transportation as Such by Reference to the National Transportation Policy.*

The Commission appears to rely for jurisdiction on the general provisions of the declaration of policy.[13] The declaration of policy is referred to in Section 203 (b) (7a) and is a general standard for the guidance of the Commission in the administration of the specific provisions of the Act, and nothing more. *McLean Trucking Co. v. U. S.*, 321 U. S. 67,

[13] "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of the Act shall be administered and enforced with a view to carrying out the above declaration of policy." (Act Sept. 18, 1940, c. 722, title 1, sec. 1; 54 Stat. 899.)

82. Among other matters the declaration of policy refers to "national defense". For the reason that the government installations on the Virginia side of the Potomac River are Army and Navy establishments and related to the war effort, the Commission concludes that it may rely on the declaration of policy and take jurisdiction over purely local intra-terminal transportation. Appellees meet this issue squarely and contend that there is nothing in the declaration of policy or in any section of the Act, which confers jurisdiction over purely local intra-terminal transportation under any circumstances whatever. The Commission has no primary jurisdiction over anything that is local anywhere, and its secondary jurisdiction over local matters is strictly ancillary and for the sole purpose of implementing its primary jurisdiction over subjects committed to it by Congress.

Every purpose and part of the Interstate Commerce Act deals with national transportation as distinguished from local affairs. The declaration of policy is nothing more than a guide or standard for the administration of the provisions of the Act having to do with *national* transportation. The declaration of policy is not an omnibus for the unrestricted enlargement of powers and jurisdiction whereby the Commission may invade without other guides or standards the domain of purely local affairs.

There are many provisions in Part I dealing with railroads and express companies, and Part II dealing with motor carriers, which confer jurisdiction on the Commission over national carriers and with respect to many local activities of such carriers. However, this jurisdiction, regardless of whether if be primary or secondary, is without exception related to national transportation matters, committed to the Commission's jurisdiction, but that jurisdiction may only be exercised in connection with national carriers. Separate and independent jurisdiction over local matters can never be exercised by the Commission solely in connection with local carriers.

Unquestionably the Commission has jurisdiction over many local activities, which are directly related to transportation in its national sense. The Commission has secondary jurisdiction over the activities of national carriers with respect to their local activities. Secondary jurisdiction may be exercised almost without limit for the purpose of preventing any national carrier from discriminating against or granting preferences to any shipper or for the purpose of preventing indirect rebates, by any means whatever. It may well be that the reference to "national defense" in the declaration of policy may call for the exercise of broad jurisdiction over national carriers. Broad jurisdiction when related to some specific provision of the Act may reach local segments of the national activities of national carriers. But the reference to "national defense" in the declaration of policy can never confer any jurisdiction on the Commission over any intra-terminal transportation or any other activity which is not connected with transportation to, from or beyond the local area.

None of the Appellees here is owned or controlled by any national carrier performing transportation beyond the local area. None of the activities of any of the Appellees affects any transportation beyond the local area. Therefore the Commission is without any jurisdiction whatever to lay hands on the local transportation here involved.

The war effort has necessitated much special legislation, including the appropriations of plants and the drafting of men. And, if necessary for the war effort, Congress might control or operate all the local transportation in the United States. But that is a matter which concerns Congress and not the Commission. Congress has not delegated to the Commission jurisdiction to determine whether a purely local activity either aids or hinders the war effort and thereupon to assume and assert jurisdiction over purely local affairs.

The extent of the all-inclusive jurisdiction and powers which the Commission would assert by merely referring to

"commerce", "postal service" and "national defense", in the declaration of policy, is illustrated by their assertion of jurisdiction over purely local transportation in this case.

The Commission demands that a street railway, over which they have no jurisdiction under any circumstance, must make joint rates and sell commutation tickets in connection with a number of independent bus lines. Based on the same shadow of asserted jurisdiction they could, with equal lack of justification, require through routes, joint rates and commutation fares between the same street railway and the same bus lines, on the one hand, and all of the interstate railroads entering the District of Columbia. Such action would hardly be approved by this Court upon the bare assertion by the Commission, that there might be some relationship between such arrangements and the war effort.

A declaration of policy standing alone does not serve to confer jurisdiction.[14] The words "national defense" appearing in the declaration of policy stand alone, insofar as purely local affairs are concerned.

In a certain proceeding the Commission established the commercial zone of Washington, D. C.[15] which was intended to and did have the effect of defining the zone of local affairs which were exempt from regulation under Section 203 (b) (8) of the Interstate Commerce Act. Somewhat comprehensive discussions of the Congressional intent and the basis for commercial zone exemptions are found in several reports by the Commission and in decisions by the Courts.[16]

Appellee, Arlington & Fairfax Motor Transportation Company, operates wholly within the commercial zone of Washington, D. C., as defined by the Commission (R. p. 860). The other Appellees conduct some operations which

[14] Mississippi Valley Barge L. v. U. S., 292 U. S. 282.

[15] Commercial Zone—Washington, D. C., 3 M. C. C. 245.

[16] Noedling Trucking Company v. U. S., 29 Fed. Supp. 537.
Palisano—Application—30 M. C. C. 591
New York Commercial Zone, 1 M. C. C. 665, 2 M. C. C. 191.

extend slightly beyond the commercial zone (Ex. 91; R. p. 1030). However, none of those routes or operations is involved in these proceedings (R. p. 843).

The Commission has established the limits of commercial zones which it would recognize in a number of cities.[17] Certain administrative rulings have been issued which define the distance beyond the corporate limits, which a motor carrier may operate without affecting the national transportation policy and without further authority from the Commission.[18] It appears to have been the object of the Commission, in fixing commercial zones, to so restrict the areas as to eliminate the exemptions under Section 203 (b) (8) from anything resembling line-haul transportation, such as was feared by the New Jersey bus operators when the original Motor Carrier Act was being considered by the committee.

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[17] Washington, D. C. Commercial Zone, 3 M. C. C. 243
New York, N. Y. Commercial Zone, 1 M. C. C. 665, 2 M. C. C. 191
St. Louis, Mo.—East St. Louis, Ill., Commercial Zone, 1 M. C. C. 656, 2 M. C. C. 285
Chicago, Ill. Commercial Zone, 1 M. C. C. 673
Cincinnati, Ohio, Commercial Zone, 26 M. C. C. 49
Los Angeles, Calif., Commercial Zone, 3 M. C. C. 248
Philadelphia, Pa., Commercial Zone, 17 M. C. C. 533.

[18] Administrative Ruling No. 87, issued April 23, 1940—

"The Bureau considers the intent of the Commission in issuing operating authority to such carriers to contemplate the service of shippers whose business establishments are in fact an integral part of the business communities near which they are located, if they do not lie within a separately incorporated borough, city, town (other than the New England type), or village, not specifically authorized to be served. In order that there may be definite and uniform administration under the foregoing interpretation, regular route common carriers by motor vehicle authorized to serve a given point, may serve all places which lie wholly within one quarter mile of the incorporated limits of said point, if the population thereof is 2500 or less; within one-half mile, if the population is between 2500 and 10,000; within one mile if the population is between 10,000 and 100,000; and within two miles if the population exceeds 100,000, all such populations to be determined according to the latest report of the United States Census Bureau."

The areas which the Commission has recognized as commercial zones bear substantial resemblance to the Kansas City, Missouri-Kansas City, Kansas, illustration which was brought to the attention of the Senate Committee. It is to be observed that the transportation here involved is not only entirely within the commercial zone of Washington, as defined by the Commission, but does not even approach the outer limits of that zone in any direction (R. p. 843).

Before the Commission could remove the exemption under Section 203 (b) (8) and under its determination of the Washington, D. C. Commercial Zone, it was bound to make certain findings. The only legal findings which the Commission could make, so as to lift the exemption, would be findings that the transportation involved affected interstate commerce in the national sense. By such interstate commerce we mean commerce originating or terminating beyond the limits of the commercial zone and not merely local interstate commerce within the commercial zone. The Commission made no such findings and, of course, under the facts in this case, it could not possibly do so.

The report and order of the Commission in and of itself negatives any contention that the Commission was, or thought it was, dealing with a subject which affected that interstate commerce which Congress committed to its jurisdiction.

> "From 12th and F Streets, N. W., in the heart of the business district and within two or three city blocks of the terminals of all of the Virginia Lines, the distances over the Highway Bridge are about 3.7 miles to the Pentagon, 4.9 miles to the Navy Annex, 4 miles to the Army Annex, and slightly farther to the Airport. Over the Memorial Bridge the distances are somewhat more than a mile longer." (R. p. 819).
>
> "This is urban, mass transportation between points in the District and points in Virginia just beyond the District-Virginia line and is the same in all essential characteristics as the transportation between residential areas of the District and commercial and Government establishments in the District. That part of the

> transportation here under consideration is not comparable with the transportation generally necessary in extension of transit service into suburban areas. In the case of the former, the movement is in vehicles loaded to utmost vehicle capacity and for relatively short distances, while the latter is characterized by longer hauls and less utilization of vehicle capacity although, under present conditions, practically all urban and suburban bus lines are heavily loaded during rush hours. It is to be noted that there are no residential areas between the District and the Virginia installations. These installations represent to all intents and purposes an extension of the main business area of Washington" (R., p. 849).

The Commission regarded the transportation as being so local that it required the Capital Transit Company to perform the additional service to the Pentagon Building at no addition to its District of Columbia intrastate fare. The Commission also required the Washington, Virginia and Maryland Coach Company to perform the entire service within both Virginia and the District of Columbia, at substantially less than its local intrastate Virginia fares, for the Virginia portion of the route. The Commission ordered a reduction from 10¢ to 8⅓¢ or a 17 per cent reduction in the intrastate fares (R., p. 814).

The Commission discusses a number of questions arising under Section 203(b)(8) as possibly lending some color to jurisdiction. However, a careful analysis of the Commission's report indicates that jurisdiction was really based on the general terms of the declaration of policy and including particularly "national defense".

After its discussion of Section 203(b)(8) the Commission said (R., p. 843):

> "In any event, we are of the opinion and find that application of the act to that transportation is, in the language of Section 203(b)(7a), necessary to carry out the national transportation policy. We conclude that we have general jurisdiction over all of the fares under consideration."

The only purpose and function of the declaration of policy is to guide the Commission in the administration of specific provisions of the Act and does not in and of itself confer any additional jurisdiction. The Commission has made no findings of fact which establish either primary or secondary jurisdiction under any provision of the Interstate Commerce Act. The Commission has failed to comprehend that a conditional exemption also connotes conditional jurisdiction. The Commission has failed to make the essential findings to support conditional jurisdiction, and under the facts of this case no such finding could have been made.

Apparently the Commission has undertaken to extend its jurisdiction under something akin to war powers. When Congress desired to clothe the Commission with war powers it has done so by specific legislation, covering specific subjects and generally providing an expiration date. In connection with the transportation here involved, Congress has not conferred on the Commission any war powers and it is significant that the Commission's orders provide no expiration date and are therefore permanent orders.

Here the Commission has reversed the usual procedure. Finding limitations on its jurisdiction by reason of Section 216(e) and being unable to touch intrastate rates, it adopts the novel course of requiring an extension of the territory and including interstate territory, which must be served at the local intrastate rates.

The Commission's conclusion that its jurisdiction is necessary to carry out the national transportation policy is predicated chiefly upon its finding that employees' dissatisfaction with the fares impeded the war effort (R., p. 944). The District Court held, and we show later in this Brief, that there is no evidence to support this finding (R., p. 944).

The United States says (Br., p. 12) that unless the Commission has jurisdiction these rates would not be regulated. That question is comprehensively argued in the brief of the Virginia State Corporation Commission, and the argument is not repeated here.

(c) *The Commission cannot extend an interstate operation beyond the termini fixed under statutory requirement.*

The interstate operations of Capital Transit Company involved in this proceeding were initiated by application of that company to the Interstate Commerce Commission for temporary authority covering routes from the Pentagon Building in Virginia over certain designated roads in Virginia and such streets in Washington, D. C. as might be designated by the local authorities in the District of Columbia. Section 40-603 (e) of the D. C. Code, 1940 Edition, provides that interstate carriers entering the District of Columbia shall operate only over such routes in the District of Columbia as may be fixed by a Joint Board consisting of the Public Utilities Commission and the District of Columbia Commissioners. Sections 207 (a) and 208 (a) of the Motor Carrier Act 1935 provide that no certificate shall be issued by the Interstate Commerce Commission for operations other than between fixed termini and that such certificate shall specify the fixed termini between which the carrier is authorized to operate. Act of August 9, 1935, c. 498; 49 Stat. 551, 552; 49 U. S. C. A. 307 (a), 308 (a).

Pursuant to such local designation of routes, the company fixed a tariff at 5 cents for the interstate trip from 23d Street and Constitution Avenue, Washington, D. C. to the Pentagon Building in Arlington County, Virginia and similarly in reverse. When it became desirable to extend the route and fix a new terminus at 19th and C Streets, as approved by the local authorities, the Interstate Commerce Commission, upon application of the company, approved a new tariff at the same 5-cent rate to and from the newly designated terminus at 19th and C Streets. Similar designation of route and terminus by the local authorities was made for the route via the Highway Bridge and a tariff fixed, showing by an accompanying m[illegible] the interstate route to which the tariff applied and the fixed terminus thereof at 7th Street and Constitution Avenue.

The Commission, by its orders in this case, has undertaken to extend the limits of the interstate routes to include *all points* in the District of Columbia reached by the local street railway and bus lines of Capital Transit Company. In so doing the Commission has ordered interstate transportation over non-designated routes and not between fixed termini, all in violation of Sections 207 (a) and 208 (a) of the Motor Carrier Act and Section 40-603 (e) of the District Code.

II.

The Order Violates Section 216(e) of the Motor Carrier Act.

Section 216 (e) of the Motor Carrier Act (49 U. S. C. A. Sec. 316 (e) contains this *proviso:*

> "Provided, however, That nothing in this part (the Motor Carrier Act is Part II of the Interstate Commerce Act) shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

The Commission is thus categorically denied authority to prescribe or regulate for any purpose whatever any fare for intrastate transportation or any service connected with intrastate transportation.

The basic and chief service connected with a transportation fare is the furnishing of a ride. Thus, when a person in the District of Columbia buys a Capital Transit token, the principal service which he has thereby purchased is a right to ride on a Capital Transit bus or street car. The most important feature of this right to ride is *Where*. When the Public Utilities Commission of the District of Columbia orders that a token shall be good for a ride anywhere within the District, it is prescribing and regulating a most important service connected with that fare. It is clear that the prescription or regulation of the ride for

which a transportation fare is good is the prescription or regulation of a service connected with that fare.

Fares for rides within the District of Columbia on Capital Transit facilities are prescribed by the Public Utilities Commission of the District of Columbia (R., p. 846). The Interstate Commerce Commission, by the order at bar in this case, attempts to extend into Virginia the service for which these fares were and are prescribed. It orders that Capital Transit Company shall make no additional charge for the trip beyond the District, and shall give a transfer from its District lines to the Virginia companies' lines (R. p. 814).

In the language of the able counsel for the United States, speaking to the District Court:

> "All that the Commission's order does here is to extend the District of Columbia rate base and the District of Columbia fares of the Capital Transit Company both cash and token to cover this Virginia transportation."

The Commission and the War and Navy Departments, by counsel, concurred in the statement of counsel for the United States. Indeed, the order of the Commission makes clear that its basic theory is that the Virginia installations should be treated, for transportation purposes, as part of the District (R., pp. 847, 849, 850. Appellants so state here (I. C. C. Br., pp. 9, 11; U. S. Br., p. 39).

When the Commission thus extends District of Columbia fares to cover this Virginia transportation, it is prescribing a service connected with those fares. The statute certainly means that the Commission cannot prescribe the ride for which an intrastate fare shall be good.

The fact of the matter is that the prescription of the trip for which a fare is good, is a regulation of the fare itself. Fares are not fixed *in vacua*. Fares are fixed for some specified trip. We do not say "The fare on the B. & O. is $1.50." We say "The fare on the B. & O. from Washington to Baltimore is $1.50." When a Commission fixes a fare,

it fixes a charge for a given trip. So when the Commission in this case says that a District fare shall be good for a ride to points in Virginia, it is clearly to that extent "regulating" the District fare. It seems absurd to us to say that the prescription of the trip for which a fare is good is not a regulation of the fare or a regulation of the service to be rendered for that fare.

The principle here involved is vastly broader and more important than this case. Suppose the City of New York has a local fare of 5 cents. Could the Interstate Commerce Commission say: "We order you to expand your local service to include Newark and Hoboken in New Jersey"? Or suppose the State of Iowa fixed an intrastate fare for city service in Des Moines at 10 cents. Could the Interstate Commerce Commission say: "By order we hereby expand the City of Des Moines for transportation purposes to include the City of Omaha, Nebraska, and order the Des Moines Company to include Omaha in its local service"? Would anybody contend that the Commission was not prescribing or regulating a service connected with intrastate transportation?

Congress, by the *proviso* in Section 216(e), meant that the Commission should have no authority over intrastate service or fares for any purpose whatever. It said precisely that. And the order of the Commission in this case is a direct violation of the Section.

This order is the first of its kind ever issued by the Commission. It comes to this Court with a strong protest from members of the Commission (R., pp. 853-856). The majority of the Commission is testing out an enlargement of its powers. Knowing that it cannot directly prescribe an intrastate fare, it seeks to accomplish a vast enlargement of its powers by a slightly less direct method. It finds that it may take an established local intrastate fare and by an order expand the territory to which that local fare shall apply. This latter is just as clear and just as direct a violation of the statute as would be an order attempting to fix the amount of the local fare.

III.

The Commission Exceeded Its Statutory Authority in Prescribing Joint Fares Between the Virginia Bus Companies and the Capital Transit Company.

This point concerns the statutory authority of the Commission to prescribe joint fares between motor common carriers of passengers who operate between points in Virginia and certain designated points in the District of Columbia over specified routes, and the Capital Transit Company, which is engaged in mass transportation partly by bus but principally by street electric railway cars in the District of Columbia. It is settled that under the common law and in the absence of statute a common carrier is free to establish or to refuse to establish joint through tariff rates with other carriers, and in the absence of statute such carriers may not be compelled to establish joint fares or arrangements for through carriage. *Southern P. Co.* v. *I. C. C.*, 200 U. S. 536; *Atchison T. & S. F.* v. *Denver and N. O. R. Co.*, 110 U. S. 667; *Louisville & N. R. Co.* v. *West Coast Naval Stores Co.*, 198 U. S. 483. It is likewise settled that the authority to prescribe rates is too vast in its effect and scope ever to be conferred by implication, but must be affirmatively granted. *I. C. C.* v. *C. N. O. & T. P. Ry. Co.*, 167 U. S. 479. Consideration of the principles of these decisions is necessary to a proper understanding of the authority which the Commission purported to exercise in this case.

The pertinent parts of section 216 (e) of the Interstate Commerce act (49 U. S. C. A. Sec. 316 (e)) are set forth in the footnote below.[19]

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[19] * * * Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle * * * in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, * * * is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or

By its reports and orders in the pending case the Commission required that the Virginia bus companies establish joint fares with the Capital Transit Company for application to passengers between the federal installations in Virginia and all points in the District of Columbia served by the Capital Transit Company, including the street electric railway operations of the Capital which constitute about 63 per cent of its total business (R., p. 842). In this requirement the Commission erred in two important respects:

First, it assumed, without evidence to support the assumption, that through routes between the Virginia bus companies and the Capital Transit Company now exist (R., p. 850).

Second, it assumed that its authority to prescribe joint fares and through routes between motor common carriers of passengers, conferred by section 216 (e) of the Interstate Commerce Act, includes a local mass transportation carrier such as the Capital Transit Company, and that section 216 (e) includes the right to require the establishment of joint fares and through routes between the Virginia companies, which are motor common carriers of passengers, good for use on the street electric railway operations of the Capital Transit Company (R., p. 850).

As to the first point: The Commission said that "through routes are now in effect, and we find that joint fares on this traffic interchanged between the Transit Company and the Virginia lines are necessary and desirable in the public interest" (R., p. 850). There is not a scintilla of evidence in the record which shows that through routes or arrange-

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unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge * * * thereafter to be observed, * * * and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of *passengers by common carriers by motor vehicle*, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated." (Italics added.)

ments for through carriage now exist between the Virginia bus lines and the Capital Transit Company with respect to passengers moving between the federal installations in Virginia and points in the District of Columbia. The fact that a passenger quits a bus of the Virginia lines and boards a street car or bus of the Capital Transit, or vice versa, does not establish the existence of a through route or an arrangement for through carriage. The passenger can not purchase a ticket from the Virginia lines which will be honored by the Capital Transit Company, nor can he purchase a ticket from the latter which will be honored by the Virginia lines. Each passenger traveling between Virginia and the District of Columbia purchases a ticket from the carrier he uses, which is good only for the service performed by that carrier (R., p. 839). There is no arrangement between the Capital Transit Company and the Virginia bus lines for the through carriage of passengers between the points involved. In fact there is no coordination of services as between the Appellees, no common terminals and no arrangements for the interchange of passengers. Each passenger boards or alights from a vehicle of Appellees at any point where the vehicle stops that suits his convenience.

It has long been settled that a through route is an arrangement, express or implied, between connecting carriers for the continuous carriage of goods or passengers from a point on the line of one carrier to a point on the line of another. An essential and indispensable element to the existence of a through route is the right of the passenger or shipper to contract for through carriage. *Alleged Unlawful Rates and Practices*, 7 I. C. C. 240; *St. Louis S. W. Ry. Co.* v. *United States*, 245 U. S. 136; *United States* v. *Munson S. S. Co.*, 283 U. S. 43; *The Ogden Gateway Case*, 35 I. C. C. 131; *Virginia Stage Lines—Southern Passenger*, 15 M. C. C. 519.

In the *Munson Case, supra*, the court held that mere continuity of movement is not enough to establish a through route or an arrangement for through carriage. In the *Vir-*

ginia Stage Lines Case, supra, one of the questions was whether passengers which were transported between points in Virginia by an intrastate bus company under a local ticket sold to the passenger by that company, where the passenger used another bus line under a separate ticket to points outside the State of Virginia, constituted the engaging in interstate commerce by the first carrier, which would make it subject to the provisions of Part II of the Interstate Commerce Act. The Commission held that the carrier was not engaged in interstate commerce. In doing so it cited the decision of this court in *New York Central* v. *Mohney*, 252 U. S. 152, and its own decision in *Red Star Lines Case*, 3 M. C. C. 313. In these cases the Court and the Commission recognized that there is an essential difference between freight traffic, which must be identified and billed, and passenger traffic in that the passenger is in position at all times to control his own movements. If the fact that in the instant case certain passengers who move from the federal installations in Virginia via the Virginia bus lines to their terminals in the District of Columbia elect to use the Capital Transit Company to continue their journey to points within the District of Columbia constitutes a through route or an arrangement for through carriage, it would follow from this premise that the Appellees have through routes with all of the railroads and other bus lines which operate between the District of Columbia and various points in the United States. The reach and consequence of this view repel its acceptance.

As to the second point: The Capital Transit Company is a local carrier engaged in mass transportation, principally in the District of Columbia, partly by motor bus and partly by street electric railway cars. Approximately 63 per cent of its business is handled in electric railway cars (R., p. 842). There is no evidence in the record which shows that the bus and the street car operations of the Capital Transit Company are so co-mingled as to be inseparable. The record is silent on this question.

Part II of the Interstate Commerce Act is commonly referred to as the Motor Carrier Act. Many of its provisions are similar to the provisions of Part I and Part III, but there are essential differences. For example, section 1 (4) of Part I makes it the duty of common carriers by railroad to establish reasonable through routes and joint rates as to freight and passenger traffic with each other and with common carriers by water subject to Part III. By section 15 (3) the Commission is given authority to compel obedience to that duty. Section 305 (b) of Part III makes it the duty of common carriers by water to establish through routes with each other and with railroads with respect to both freight and passenger traffic. By section 307 (d) the Commission is given authority to compel obedience to that duty. Under the provisions of Part II motor common carriers of property are not required to establish either joint rates or through routes.

Section 216 (a) does impose upon "every common carrier of passengers by motor vehicle the duty to establish reasonable through routes with other *such* common carriers * * * and * * * to establish, observe and enforce just and reasonable individual and joint rates, fares, etc. * * * and just and reasonable regulations and practices relating thereto, etc. * * * and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce * * *." In Section 216 (e), above quoted, authority is conferred upon the Commission under the conditions described therein to enforce obedience to that duty in an appropriate proceeding.

It will thus be seen that the duty of a motor common carrier to establish joint rates and through routes is limited to joint rates and through routes between motor common carriers of passengers and that the authority of the Commission to compel obedience to that duty is likewise limited. It is clear that a local carrier like the Capital Transit Company, which is engaged in local mass transportation, is not embraced within the expression "with other such common

carriers'' as used in section 216 (a) even as to its bus transportation. The rational view is that the quoted phrase means motor common carriers of passengers which are engaged in substantially similar transportation services.

The Commission, in its report, and counsel for Appellants, in their brief, make a labored and unconvincing effort to find some justification for that part of the Commission's order which requires the Appellees to establish joint fares for application to passengers moving between the federal installations in Virginia and points served by the electric street railway operations of the Capital Transit Company in the District of Columbia. In fact, it is difficult to understand the reasoning made in this respect. In the *Omaha and Council Bluffs case*, 230 U. S. 324, this Court held that a street electric railroad engaged in interstate commerce is not subject to the Interstate Commerce Act because not comprehended within the meaning of the word "railroad" as used in section 1 of that act. To circumvent that decision, the Commission arbitrarily stated that the Capital Transit Company is not now, although it may have been in the past, a street electric passenger railway in the usual sense of that term. This statement was made despite the fact that over 63 per cent of the passenger business of the Capital Transit Company is handled on its street electric cars (R., p. 842).

The precise ground on which the Commission predicates its exercise of authority to prescribe joint fares under section 216 (a) is far from clear. It appears, however, that the Commission seeks to justify its action on two grounds: (a) that the bus and the street car operations of the Capital Transit Company are so co-mingled as to be inseparable (R., p. 842) and therefore the Commission may treat the entire operations of the Capital as constituting the operations of a motor common carrier of passengers, and (b) that as the authority of the Commission to prescribe joint fares and through routes in section 15 (3) and section 307 (d) excludes electric railways from the exercise of this authority,

and, as section 216 (e) does not contain similar excluding language, there is an implied authority in that section to prescribe joint fares for application between the Virginia bus lines and the electric street railway operations of the Capital Transit Company (R., p. 841).

We shall deal with these grounds in the order in which they are stated. There is absolutely no evidence in the record to show that the bus and the street electric railway operations of the Capital are so co-mingled as to be inseparable. The record is silent on this point, but in the nature of things it is clear that the operations of the buses and of the street electric railway cars are separable. There is no substance to the grounds relied on in clause (a). In dealing with this phase of the case the Commission said that it is analogous to the relation between intrastate and interstate railroad traffic and rates as to which, in the *Wisconsin Passenger Fares Case*, 257 U. S. 563, 588, this Court said that the effective control of the one class of traffic must embrace some control over the other in view of the blending of both in actual operation. Aside from the fact that the two situations are not analogous, it is worth mentioning that the statement made by Chief Justice Taft in the *Wisconsin case* was largely *obiter dictum* since his opinion clearly reveals that the Court was not called upon to base, and did not base, its decision in that case on the blending of the intrastate and interstate traffic.

The Chief Justice went out of his way to say that the Interstate Commerce Commission has no authority by section 13 (4) to regulate intrastate fares as such, but that the authority there conferred could not be exercised without the incidental regulation of intrastate commerce. That section confers upon the Commission the specific statutory authority to remove unjust discrimination and burdens against interstate commerce, and against persons and localities by requiring the railroads to give like treatment in respect to fares applicable to intrastate commerce and interstate commerce. In the *Wisconsin case* the Court dealt

with the incidental effects on intrastate commerce of the exercise by the Commission of an authority specifically conferred by statute to prevent unjust discrimination against interstate commerce. Here the Commission has seized upon the so-called co-mingling doctrine to justify the exercise of an authority that does not exist. Before the co-mingling doctrine has any application in any case, there must first exist statutory authority to act on the subject matter. The *Wisconsin case* and other similar cases which have referred to that doctrine merely hold that where statutory authority exists under the commerce clause and the subject matter is co-mingled and blended in such a manner as to be inseparable, the federal authority may be exercised even though it has an incidental effect upon a subject not otherwise within the control of the federal authority. Moreover, in the light of the scope of the authority of this Commission under section 3 and section 13 (4) of the Interstate Commerce Act, it is clear that the so-called co-mingling or blending of traffic referred to in the *Wisconsin case* was relevant and material principally because it tended to show similarity of transportation conditions. That in turn would remove any justification that might otherwise exist for the maintenance of intrastate fares relatively lower than the corresponding interstate fares for similar services.

It is clear that the statement from the *Wisconsin case*, relied on by the Commission as to co-mingling, affords no justification for the authority exercised by the Commission in the instant case. It is equally clear that if the facts otherwise justified the action by the Commission, and they do not, it could only prescribe joint fares between the Virginia bus lines for application on the bus lines of the Capital Transit Company.

In its discussion of this question, the Commission referred to the decision of this Court in *United States* v. *Village of Hubbard*, 266 U. S. 474. In that case the Court pointed out the historical distinction under the Interstate Commerce Act between the absence of authority in the Commission

over the rates of street electric railways and the presence of its authority over the rates and routes of interurban electric railways. The decision of the Commission implies, without affirmatively so finding, that the Capital Transit Company may also be treated as an interurban electric railway (R., p. 841). The Commission itself has always treated that company and its predecessor as a street electric railway not subject to its jurisdiction. See *Depreciation Charges of W. R. Y. & E. Co.*, 85 I. C. C. 126. However, as the record affirmatively establishes that no arrangement for through carriage or through routes exists as between the Capital Transit Company and the Virginia bus lines, and as these carriers have not established any individual or joint through charges in conjunction with each other such as are authorized by section 216 (c) and such as are recognized by section 216 (e), it is wholly immaterial whether the Transit Company be treated as a street electric railway or as an interurban electric railway. The Commission has no authority, either under Part I or Part II of the Act, to prescribe joint fares between interurban electric railways or any other railroad and common carriers of passengers by motor vehicle.

The authority to prescribe joint rates and through routes is an extraordinary exercise of power. It is too vast in its effect and scope ever to be conferred by implication. *Interstate Commerce Commission* v. *C. N. O. & T. P.*, 167 U. S. 479. In enacting Part II of the Interstate Commerce Act, Congress was careful to restrict that authority specifically conferred in section 216 (e) to joint rates and through routes between motor common carriers of passengers. The Commission is a creature of statute. It has no inherent authority. The provisions of that act are its chart and compass. To say that an extraordinary authority such as the prescription of joint fares and through routes may be granted in a statute merely because it is not specifically prohibited is a vicious doctrine which should not be sanctioned by this Court. *Expressio unius est exclusio alterius.*

A comparison of the language of section 216 (a), section 216 (c) and section 216 (e) clearly reveals that as to joint rates and through routes the authority of the Commission is limited to joint rates and through routes between motor common carriers of passengers. As we have shown, paragraph (a) of that section imposes the duty upon motor common carriers of passengers to establish reasonable through routes and reasonable individual and joint fares with respect to transportation via such routes. Section 216 (c) provides that motor common carriers of property and passengers *may* establish reasonable through routes and joint rates, etc., with other such carriers or with common carriers by railroad, express or water and that when such through routes and joint rates are established it shall be the duty of the carriers, parties thereto, to establish just and reasonable regulations in connection therewith and just, reasonable and equitable divisions of the joint rates.

Section 216 (e) provides that in an appropriate proceeding the Commission may determine whether an individual or joint rate established by motor common carriers "in conjunction with" any common carrier by railroad, express or water is unreasonable, unjustly discriminatory or unduly prejudicial. If it finds in such a proceeding that such rates voluntarily established, as contemplated by section 216 (c), violate any of these prohibitions, the Commission is given authority to prescribe the lawful rate, fare or charge to be thereafter observed. It will be noted, however, that this authority exists only when motor common carriers, railroads, express companies or water carriers voluntarily establish joint rates and through routes "in conjunction with" each other as authorized by section 216 (c). No such through routes, rates or practices have been established by the Appellees in conjunction with each other or with railroads, etc.

In the instant case the Commission has attempted to initiate joint fares and has erroneously assumed that through routes have been established between the Appellees in re-

spect to the traffic involved. Under the provisions of section 216 (e), as we have repeatedly stated, the authority of the Commission to initiate joint fares and through routes is limited by the terms of section 216 (e) to joint fares and through routes between motor common carriers of passengers. It is a well recognized principle that common carriers, like others, may do many things on their own initiative which they may not be compelled to do. The provisions of section 216 (e) and the limitation on the authority of the Commission in section 216 (e) are a statutory recognition of that principle.

For the reasons stated, it is clear that there is no factual or other basis in the record for the finding by the Commission that through routes exist between the Virginia bus lines and the Capital Transit Company for the transportation of passengers between the federal installations in Virginia and points in the District of Columbia; that the Commission has no authority to prescribe joint fares and through routes between motor common carriers of passengers and the Capital Transit Company, which is engaged in local mass transportation, partly by bus and partly by street electric railway; and that the Commission erred in assuming that the omission of certain restrictive language in section 216 (e) as to electric railroads, which is contained in sections 15 (3) and 307 (d), confers the authority exercised by implication.

IV.

The Interstate Commerce Act Does Not Authorize the Commission to Prescribe Commutation Fares or Any Special Fares.

The Interstate Commerce Act does not authorize the Commission to prescribe commutation fares or any other special fares or charges for application by motor common carriers. The standard set up by that act, section 216(d), is that such common carriers shall establish and maintain fares and charges which are just and reasonable and free

from unjust discrimination, undue prejudice or preference. The policy of the provisions of Part II, as well as the other parts of the Interstate Commerce Act, is to leave to the carriers themselves the right to determine whether commutation or special fares should be established in particular instances. This policy was cogently stated by this Court in *C. N. O. & T. P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 197, where the Court said that subject to the two leading prohibitions that their charges shall not be unjust or unreasonable and shall not unjustly discriminate so as to give undue preference or advantage to persons or traffic similarly circumstanced, "the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits."

This being so, it seems clear that the Commission exceeded its authority when it required the establishment of commutation fares. This may be illustrated by reference to the Arlington and Fairfax. The fares which the Commission directed the Arlington and Fairfax to put into effect were (R., p. 814):

1. A cash fare of 10 cents per single trip.

2. Three tokens for 25 cents, equal to 8⅓ cents per one-way trip.

3. Combination bus and bus-street car fares for multiple trips of Arlington and Fairfax and Capital Transit Company of $1.60 for twelve one-way trips, equal to 13⅓ cents per one-way trip—the latter fare permitted to be evidenced in the form of tokens or ticket book valid for 60 days or both, which tickets were to include *all* of the transfer privileges within the District of Columbia now offered by the Capital Transit.

The first two of the foregoing are fares between the Virginia installations and the terminal of the company in the District of Columbia and intermediate points, and the third is between the Virginia installations and any point in the District of Columbia.

The cash 10 cent fare per one-way trip is thus the "just and reasonable rate" which the Commission has found for the service performed. The other fares are obviously at "reduced rates". They are "commutation rates".

The Commission has defined the commutation ticket or fare as follows:

> "As applied to passenger traffic commutation seems to signify the payment of a single sum of the cost to the traveler for transportation, limited in point of time or in number of trips, between two designated points; apparently it implies also a fare per trip that is less than the normal fare for a one-way journey". *Commutation Rate Case*, 21 I. C. C. 428.

It has been defined thus:

> "*Commutation ticket.* A railroad ticket giving the holder the right to travel at a certain rate for a limited number of trips (or for an unlimited number within a certain period of time) for a less amount than would be paid in the aggregate for so many separate trips. Interstate Commerce Com'n v. Baltimore & O. R. Co. (C. C.) 43 Fed. 56." (Black's Law Dictionary, P. 230)

It will be remembered that the Arlington and Fairfax never voluntarily or otherwise established or maintained a commutation or reduced rate fare—never sold tickets for "multiple trips" (R., p. 839).

Unquestionably, where a carrier has itself *voluntarily* inaugurated and presently maintains a commutation rate and service, such rates and service may be regulated by the Commission so as to prevent discrimination, but where a carrier has not voluntarily instituted such a service and rate, the Commission is without power to compel it so to do.

The dissenting opinion of Commissioner Patterson, con-

curred in by Commissioner Miller, in the first report (R. p. 855) says:

> "As to (2), it is my opinion that the tokens or tickets which respondents will be required to sell come within the definition of 'commutation tickets' as that term is used in the Act. Section 22 of Part I, which is made applicable to motor carriers by section 217(b) of Part II, permits, but does not require, the issuance of commutation tickets. We have always found that so long as commutation fares are maintained they must be reasonable and impartially applied. We have never heretofore found that we have authority to require their establishment in the first instance. *Weber Club & Intermountain Fair Assn.* v. *O. S. L. R. Co.*, 17 I. C. C. 212, *Commutation Rate Case*, 21 I. C. C. 428. *In Re Mileage, Excursion, and Commutation Tickets*, 23 I. C. C. 95, 96; *Reduced Rates*, 1922, 68 I. C. C. 676, 729; *Passenger Fares and Surcharges*, 214 I. C. C. 174, 251.
>
> "If we have power to require establishment of the fares above referred to, we also have power to require the railroads to initiate the sale of tickets in wholesale lots for local or joint transportation at a smaller sum per ticket than a reasonable single-trip fare. We have never claimed or exercised such power. I do not think we have it".

This we submit is an accurate statement of the law.

Interstate Commerce Commission Cases.

The question of commutation tickets has been considered by the Commission on many occasions, and the rule stated by Commissioner Patterson is supported by an unbroken line of cases.

In the *Weber Club & Intermountain Fair Assn.* v. *O. S. L. R. Co.*, (1909) 17 I. C. C. 212, 216, the Commission definitely held that it had no power to require a carrier to put into effect a commutation or excursion ticket. After referring to several of the earlier cases, the Commission said:

> "The inference from these cases is that the *carrier may determine for itself* whether it will sell mileage,

commutation or excursion tickets, but that if it elects to sell them it must do so within the provision of the Act".

In the *Commutation Rate Case* (1911), 21 I. C. C. 428, at page 443, the Commission, speaking through Commissioner Harlan, said:

> "It is conceded[20] * * * that carriers may not be *compelled* under the present law to establish commutation rates. This is probably true. But having undertaken * * * the power * * * of the Commission * * * to examine into the reasonableness * * * seems to be beyond question".

In the Matter of the "*Application and Use of Mileage, Excursion, and Commutation Tickets for Through Transportation in Connection with other lawfully Established Fares*" 23 I. C. C. 95, 96 (1912) Commissioner Clements, speaking for the Commission, again stated the doctrine that:

> "Among the things which *they* (the carriers) *are permitted but not compelled* to do is to establish excursion, commutation and mileage tickets * * *".

In re Mileage Books (1913), 28 I. C. C. 318 holds that where issuance is voluntary—conditions attached thereto must not be discriminatory.

At page 323 the Commission says:

> "It appears that public regulating authorities have no power to *compel* the issuance of such mileage books".

and later in the same opinion (p. 325) this:

> "Section 22 of the act to regulate commerce provides in part: 'That nothing in this act shall prevent * * * the issuance of mileage, excursion, or commutation passenger tickets'. This language has been construed as a permission to the carriers, and not as a grant of authority to the Commission to compel the

[20] By the principal complainant.

carriers to furnish passenger transportation at less than the reasonable maximum. *Field* v. *S. Ry. Co.*, 13 I. C. C., 298; *Eschner* v. *P. R. R. Co.*, 18 I. C. C., 60; *The Commutation Rate Case*, 21 I. C. C., 428; and *In Re Mileage Excursion and Commutation Tickets*, 23 I. C. C., 95".

In "*Reduced Rates*" (1922), 68 I. C. C. 676, at page 729, the Commission again reiterated this rule:

"We have no authority *to require* carriers to establish for particular passengers or particular occasions special fares lower than regular fares".

Perhaps it might be thought that some change had occurred in the Commission's consistent statement of the rule since the time of these earlier decisions, but that is not the fact.

In *1936*, after the passage of the Motor Carrier Act, there is found a further emphatic statement of the limitation on the Commission's power in *Re Passenger Fares and Surcharges* (1936), 214 I. C. C. 174, at page 250. In an opinion of the entire Commission it is said:

"After referring to the case last above cited (2 I. C. C. 649) and to others of like import the Commission in *Weber Club & Intermountain Fair Assn.* v. *O. S. L. R. Co.*, 17 I. C. C. 212, set forth this clear statement of the law.

"The inference from these cases is that the carrier may determine for itself whether it will sell mileage, commutation or excursion tickets; but that, if it elects to sell them it must do so subject to the provisions of the Act.

"We have not receded from the position thus taken in the cases cited and are not persuaded that we should do so now."

And in *Geo. W. Bristol* v. *Central RR. of N. J.* (1936), 218 I. C. C. 654, 656, at page 656, the Commission says:

"Under §22 of the Act the granting of relatively low fares for commutation services is permitted, and,

as a general rule; the conditions relating thereto are within the discretion of the carrier so long as they do not result in unlawful discrimination, prejudice, or preference.

"This *permission* does not create an *obligation*.

"It follows that the carrier likewise has the right to withdraw the lower fare as was done in the instant proceeding."

In its first opinion and report the Commission attempts no justification for the commutation fares, although the minority opinion of Commissioner Patterson, concurred in by Commissioner Miller, emphatically disputes the power (R., p. 855). After the District Court had set aside its order, the Commission in its second report attempts to justify its power. This, it is submitted, seems to be but a halting effort to buttress an untenable position. The quotation from *Re Passenger Fares and Surcharges*, supra, that "We have not receded from the position thus taken in the cases cited and are not persuaded that we should do so now" scarcely justifies the characterization by the Commission in its second report that "which statements" (of the rule here contended for) "have been *inadvertently* repeated or paraphrased in reports in recent years" (R., p. 823).

The Commission in effect says that although it may not have possessed this power in the past, *now* it does. From what source the present power is derived, we are not informed, and this in spite of the challenge in Commissioner Patterson's opinion that "We have never claimed or exercised such power. I do not think we have it" (R., p. 855).

The Decisions of This Court.

This Court has taken perhaps an even stronger stand on the subject of reduced rates than the Commission. Certainly it has declared a constitutional invalidity as to *involuntary "reduced rates"*.

In 1891 the legislature of the State of Michigan passed an act requiring the sale of 1,000 mile tickets within the State of Michigan valid for one year. Action was brought by the carrier to test the validity of this enactment of the legislature. This Court reversed the highest court of the State of Michigan and held the statute invalid. The case is reported as *Lake Shore & Michigan Southern Ry. Co. v. Henry C. Smith*, 173 U. S. 684. Of the requirement that the carrier should be compelled to sell the mileage ticket the Court said:

> "It is a pure, bald and unmixed power of discrimination in favor of a few having occasion to travel on the road and permitting them to do so at less expense than others provided they buy a certain number of tickets at one time".

Later, in *Pennsylvania R. R. Co. v. Towers, et al.* (1917), 245 U. S. 6, this Court modified, in part, its *Lake Shore* decision to the extent of holding there might be regulation where the carrier had voluntarily established such fares, but left in force that portion of its ruling which affects the question now before the Court, namely, that there is no power *to compel* the establishment of a system of commutation rates *where none has been established*. In the *Towers* case the Public Service Commission of Maryland had put into effect an order requiring the Pennsylvania Railroad Company to sell commutation tickets at certain specified rates. *A system of commutation rates had already been voluntarily established by the Pennsylvania Railroad.* The decision in the *Towers* case was limited to a situation in which the carrier had itself *voluntarily established* a system of commutation rates and the *Lake Shore* case was only overruled to the extent that it was inconsistent with the ruling of the *Towers* case. The Court said (p. 17):

> "The views therein expressed which are inconsistent with the right of the states to fix reasonable commutation fares *when the carrier has itself established fares* for such service must be regarded as overruled by the decision in this case". (Italics ours)

In 1922 Congress passed an amendment to Section 22 of the Interstate Commerce Act by adding thereto what became paragraphs 2 and 3 of that Section. The Commission was directed to require the carriers to issue interchangeable mileage or scrip coupon tickets "at just and reasonable rates". The validity of the order which the Commission made following the passage of the statute came before the court in *United States* v. *New York Central R. Co.*, et al, (1924) 263 U. S. 603. A three-judge court had invalidated the order of the Commission, and this Court, in an opinion by Mr. Justice Holmes, upholding the three-judge court, said:

> "We are of opinion that the interpretation of the statute in the court below was right. There is no doubt that the bill owed its origin to a movement on the part of traveling salesmen and others to obtain interchangeable mileage or scrip coupon books at reduced rates. The bill that was passed originally fixed reduced rates, but it was amended to its present form undoubtedly because the prevailing opinion was that the rates should be determined in the usual way, by the usual body. The object of the traveling salesmen was defeated in so far as Congress declined to take any step beyond authorizing the issue of scrip tickets * * *. *Apart from constitutional* difficulties (*Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565), *the whole tendency of the law has been adverse to the enactment as proposed; at least, unless a clear case should be made out.* (Italics supplied)
>
> "* * * It seems to us plain that the Commission was not prepared to make its order on independent grounds apart from the deference naturally paid to the supposed wishes of Congress. But we think that it erred in reading the wishes that originated the statute as an effective term of the statute that was passed, and therefore that the present order cannot stand".

It will be seen that this Court again indicated the constitutional difficulties involved in requiring a carrier to establish mileage tickets. It is further to be noted that

the offending paragraphs (2 and 3) of Section 22 were repealed by Act of September 18, 1940.

The principle of law in the *New York Central case* and the principle of law here are the same. In that case the Commission erroneously assumed that because Congress had given the authority to prescribe mileage books or scrip coupon books, it followed that it could disregard the standards set up in the Act that such books could be prescribed only at just and reasonable rates, and proceeded to fix a rate approximately 90 per cent of the going standard fares. In the instant case, the Commission has likewise assumed that it has the authority to prescribe a lower fare as a coupon or a book than it might prescribe as a straight cash fare. In fact, the Commission approved a cash single fare in this case as reasonable, but prescribed a substantially lower fare with the requirement that Appellees issue tokens or books.

Section 22 of the Act (the Section which authorizes the issuance of mileage, excursion, or commutation passenger tickets) provides that:

> "Nothing in this chapter shall prevent the carriage * * * free or at reduced rates for the United States, State or municipal governments * * * ".

The question of whether this Section should be construed as denying to the Commission power to prohibit such reduced rates upon certain goods for a municipal government where they resulted in unjust discrimination or in undue prejudice to interstate commerce, came on for decision in 1922 in *Nashville, St. L. & C. R. Co.* v. *Tennessee*, 262 U. S. 318. The Court in an opinion by Mr. Justice Brandeis upheld the Commission's power. The opinion emphasizes the permissive nature of the matters set up in Section 22 and calls attention (footnote 4, page 324) to the Interstate Commerce Commission cases as ordinarily not conferring upon the Commission power to establish such exceptions to the normal rates and fares.

Not only is the principle asserted thoroughly established by authority, but it is in harmony with the spirit and purpose of the Interstate Commerce Act. As this Court said in *Northern Pacific RR v. North Dakota Ex Rel McCue*, 236 U. S. 585, at page 595:

> "But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, * * *. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement. * * *"

It is true that the foregoing was said of a State regulatory body and not of the Interstate Commerce Commission, but the principle is identical.

V.

The Order Establishes an Unreasonable Differential in Rates as Between the Carriers.

If an 8⅓ or 10 cent fare for a given service is considered by the Commission a reasonable fare for one carrier and no fare at all is considered reasonable for the same service for another carrier, this is obviously, in the absence of compelling evidence, such an arbitrary thing that it cannot be considered reasonable.

A person going from any point in the District to the Pentagon Building goes by two buses, or by a street car and a bus. Under the order of the Commission if he goes all the way by Capital Transit he pays 8⅓ cents (R., p. 814). If

he goes by the same highways, practically the same service, but uses as his second bus one of the Virginia companies, he pays 13⅓ cents if he buys a commutation book and 18⅓ cents if he doesn't (R., p. 814). In other words, two routes are side by side, rendering the same service between the same points. The fare over one is 8⅓ cents and over the other is 13⅓ or 18⅓ cents. We submit that a more simple example of illegal preference and discrimination would be difficult to imagine.

Four of the Commissioners agreed with us on this point. Two of them, of whom one was the Commissioner who heard the case, said flatly that the order is unduly preferential. Two others said that the differing rates "lack something in reasonableness" (R., pp. 852, 854-856).

Moreover, counsel for the War Department seemed to agree with this point at the hearing. In fact it was they who argued that a difference in these rates was discriminatory. The record shows, at pages 540, 541, that counsel for the Department inquired of one of his witnesses as to whether an equalizing of the rates would not tend to lessen the load on Capital Transit buses, and in so doing he used this language—

> "Major Ristroph, it is your opinion that if the discrimination in fares was removed so that there was a uniform fare between these installations and the District that the effect of removal of such differences would be to reduce the necessity for the same number of busses to carry the peak hour traffic?"

The United States argues that the difference in the fare between the unitary Capital Transit transportation and the inter-line transportation contemplated by the Commission's order simply continues a difference which had previously existed at a somewhat higher level. This fact certainly adds nothing to the validity of the order of the Commission, which is the question before the Court. In *Lake Cargo Coal case*, 139 I. C. C. 386, 387, the Commission, speaking of the Transportation Act, said:

> "* * * * It requires that rates shall not only be reasonble per se, but just and reasonable in their relation to other rates on like traffic in the same territory that afford a proper standard of comparison * * *."

The same principle was involved in *Clarksburg-Columbus Bridge Co.* v. *Woodring*, 89 F. (2d) 788; 67 App. D. C. 44, relating to the fares of two competing toll bridges.

VI.

The Finding as to Dissatisfaction of Employees at the Virginia Installations is Without Support of Any Evidence.

Appellants assert that the transportation fares to the Virginia installations are a cause of dissatisfaction among the employees so great as to cause an extraordinary high rate of "separation" from the service and thus to impede the war effort (R., p. 850). It is clear from the opinion of the majority of the Commission that this claim was a major factor, if not the sole factor, which impelled the Commission to issue its order directing that the fares be reduced. The claim is, of course, a serious claim. We assert that not only is there no evidence to support the claim, but that the companies proved that there is no such dissatisfaction and that there is no such rate of separation. We shall show that the claim rests entirely upon an unsupported assertion by counsel for the Departments and the recitation of an opinion said to be held by the Secretaries of War and Navy, unsupported by any facts.

In his letter of June 16, 1943, to the Commission (Ex. 7; R., p. 45) which was the basis upon which this proceeding was instigated, the Secretary of War stated, "I believe * * * that the present transportation charges and conditions operate to the detriment of the efficiency and well-being of War Department personnel and against the conduct of the war effort." A compilation (Ex. 104; R., p. 1043) prepared under the supervision of Major Ristroph (R., p. 660) was

the basis for the statements made in that letter (R., p. 661). The first witness presented in the proceeding was Major General John T. Lewis, Commanding General of the Military District of Washington (R., p. 16), who stated that the additional cost of the Pentagon operation had rapidly developed into a major factor in personnel turnover at the Pentagon and at Gravelly Point, and that it is the opinion of the Secretary of War that the present fares are a detriment to the war effort, and further that at the present time transportation is the major complaint by far given by employees as a reason for severing their connections at the Pentagon Building (R., p. 23). He stated that this latter was his personal opinion and based upon information which he had received. Lieutenant Commander Randolph, Executive Officer of the Transportation Branch in the Office of the Assistant Secretary of the Navy, testified that it is the belief of the Navy Department that the existing fares are a discrimination against employees working in the Arlington Annex (R., p. 26). He explained that he had no personal knowledge of the facts and that his statement was based on exhibits which would be introduced by other witnesses (R., p. 27). When General Lewis was pressed with cross-examination, counsel for the War Department stated, "Yes, we have witnesses to bring all of this, because it is utterly pointless; he knows the position of the War Department and that is all that we have introduced" (R., p. 19). And again, "There are other witnesses to go into these detail things, and as far as our statement of policy is concerned, he is best in a position to make it, because he is more intimately acquainted with the policy questions involved here, and the negotiations between the Secretary and other people" (R., p. 21). And again, "Obviously this type of witness is not expected to testify to things of this sort" (R., p. 25). Since the witness was merely stating an opinion, and not testifying to facts, cross-examination ceased.

In his opening statement counsel for the War Department stated, "In the opinion of the Secretaries of War and Navy

the present high cost of transportation is detrimental to the war effort" (R. p. 15).

In its order of January 18, 1944, the Commission, after discussing the routes and fares and its jurisdiction, said:

> "The War and Navy Departments, hereinafter referred to as the Departments, offered considerable evidence intended to show the dissatisfaction of their employees with the fares which they are required to pay for transportation between the District and the Virginia installations; and to indicate the large turnover in personnel which is alleged to be due to such dissatisfaction. This evidence serves to show that the Departments and their employees have a real and substantial interest in the proceeding. We recognize that they have such an interest and it will not be necessary to discuss the evidence in detail." (R. p. 843).

In its findings the Commission said:

> "The primary reason set forth by the Departments for the institution of this investigation was the large turnover of employees in the Virginia installations. It was the thought that the transportation charges were an important underlying cause. The evidence bears out this belief, although doubtless, there are other important causes." (R. p. 850).

In its supplemental report the Commission said:

> "It is clear that in order to ensure for the transportation here considered fares that do not exceed a level operating against the full efficiency of the important services performed at the Virginia installations in the conduct of the war, it is essential that the fares be subjected to regulation. As above said, it is considered and has been shown that the existing fares are having an effect detrimental to such services and there can be no assurance against the charging of excessive fares except by subjecting them to regulation." (R. p. 819).

In fact, the sole basis for the Commission order is its assertion of dissatisfaction on the part of federal employees with the fares.

In time of war a charge that a given condition is a detriment to the war effort is a serious charge, and at any time the opinions of the Secretaries of War and Navy are entitled to great respect. But unsupported assertions and expressions of opinion cannot be substituted for facts. A quasi-judicial tribunal such as the Interstate Commerce Commission, and the Courts, cannot base determinations upon unsupported assertions. The rule, applicable in time of war as in time of peace, is that a finding of fact must be supported by substantial evidence.

The evidence presented by the War and Navy Departments on this phase of the case is in two parts, (1) relating to the rate of "separations" at the Virginia installations, and (2) evidence as to the attitude of employees at those installations toward the bus fares and service.

The witness as to the rate of separation was Dr. Edward E. Franklin, statistician in the Office of the Secretary of War. He presented Exhibit 23 (R., p. 970), which he stated shows the separations at the Air Force Annex, the Pentagon and the "accessible" locations in the District (R., p. 74). It was based on the War Department report for May of 1943. It shows that the average separation rate among civilian personnel at Gravelly Point is 6.75 per cent, at the Pentagon 4.46 per cent, and for Gravelly Point and the Pentagon combined 4.70 per cent, and at "accessible locations in the District of Columbia" 3.26 per cent (R. p. 74). On cross-examination this witness stated that "separations" include those who are discharged, those who quit, those who transfer to another Government department, and those who are inducted into the armed services (R. p. 75). He stated that the term "accessible locations" in the District of Columbia did not include the Quartermaster Corps or the Finance Department (R. p. 75). Exhibit 23 was prepared on August 17, 1943, and it developed that the witness had prepared a similar exhibit under date of July 31, 1943 (R. p. 81), which was a preliminary analysis of essentially the same data which included the "inaccessible" locations within the

District (Ex. 34; R., p. 981). This exhibit shows that the so-called "inaccessible locations in D. C." had an average separation rate of 5.6 per cent, as compared to an average separation rate in all the Virginia installations of 4.7 per cent. On further cross-examination the witness stated the Finance Department, which he included as an "inaccessible" location, was located principally at 801 Exchange Place, Northeast, which the witness thought is served by both street car and bus (R. p. 572), and in part at the War Department Building at 23rd and D Streets, Northwest, which has both street car and bus transportation nearby (R. p. 573). The separation rate for the Finance Department was 6.7 per cent for the month of May.

The witness further testified that the total separations for the War Department in metropolitan Washington for May were about 5.3 per cent (R. p. 80).

Thus the simple fact is, as proven by the statistician produced by the War Department, that the rate of separation for the Virginia installations is less than the average for employees of the Department in the whole Metropolitan Area, 4.70 per cent for the Virginia installations against 5.3 per cent for the Metropolitan Area. It was only by excluding some Departments in the District which had high separation rates, 6.7 per cent for Finance and 5.1 per cent for the Quartermaster (p. 11 of Ex. 99; R., p. 1033), and terming the remainder "accessible locations", that the Department was able to produce Exhibit 23, alleging a rate of only 3.26 per cent for "accessible locations" in the District of Columbia.

The second part of the evidence on this point concerns the attitude of employees at the Virginia installations toward the transportation fares. The Departments presented two groups of witnesses to testify on the point. The first group consisted of five employees (R. pp. 366, 368, 370, 372, 374). These witnesss were asked whether they felt that the bus transportation is too high. The first replied, "Well, I do feel $7.50 is quite a bit to pay for transporta-

tion" (R. p. 367). The next three said, "Yes", and the fifth responded with a question and then said that she felt it would be much fairer if her pass were good for the trip to the Pentagon (R. p. 375).

The second group of witnesses were four employees who worked with the personel at Pentagon and Gravelly Point (R. pp. 376, 380, 384, 385). The first testified that her duty was to give interviews to incoming and outgoing employees (R. p. 376). Asked the question, "Now, do you receive a lot of complaints about the transportation service to the Pentagon and particularly the high cost of it?", the witness replied, "We receive some". Pressed twice again with the question (R. pp. 378, 380) as to whether transportation was a "principal cause", a "material factor", the witness would only say, "Transportation is a cause of complaint in a great many instances", and "We have complaints in regard to the distance of transportation, and in regard to the confusion on transportation routes, and in regard to the crowded conditions on the several buses, and also the expense involved" (R. p. 378). The second witness, also employed in interviewing employees when they leave the Department, was asked the question, "Can you tell us what the principal causes are for employees leaving the service?" (R. p. 381). She replied, "Well, there are a lot of causes and so many factors that contribute to it that it is hard to say any particular thing, they want to go back home, living cost in Washington" (R. p. 381). And again she said, "I would not say that they leave because of transportation. * * * I would say that it is a contributing factor but not the main reason for their leaving" (R. p. 381).

The third witness was the personnel officer for the Air Transport Command at Gravelly Point, which has only 450 employees (R. p. 384). This witness testified that transportation is one of the two factors for dissatisfaction, and he was then asked, "And do these complaints concern themselves particularly with the high cost of getting to Gravelly

Point?". He replied, "Well, it goes further than just the high cost; there is also the number of changes that they have to make, location, crowded buses, and so forth. They also mention cost" (R. p. 385). On cross-examination he said that the transportation problem is one of the factors, it is not the main factor (R. p. 385).

The fourth witness of this group was the Chief of the Personnel Relations Branch of the Army Air Forces at Gravelly Point. Asked to tell some of the principal causes of complaint that employees offer when they quit, the witness said, "Well, their difficulty, when they leave, the particular cause or causes, the work isn't right, someone needs them at home, but what really is true when you begin to talk with them is that they are disgusted with life in Washington. The salary looks awfully good to them when they come here, and when they find out that they do not have any left at the end of the time, why, they are ready to quit" (R. p. 386). Pressed again to give some of the reasons for dissatisfaction, the witness said, "It is getting tired of being in Washington and not having any money". Asked, "Is transportation an element in that dissatisfaction?", the witness said, "Yes, it is". Asked to elaborate on that a little, she said "Well, at Gravelly Point, you know, the people pay 10 cents to get over from 12th and Pennsylvania where they only pay a nickel at the Pentagon, and we just hear that. If you like, I might give you an impression now; I don't know the ins and outs of that bus fare, but they keep complaining why can't we ever have a pass that will bring us clear over here, or why do we have to pay 10 cents when we don't go any farther than the people in the Pentagon Building that only pay 5 cents" (R., p. 387).

That was the sum total of the evidence presented by the War Department on the dissatisfaction of employees. Not one of the witnesses produced was emphatic about the matter. Not one assigned bus fares a major place in employees' complaints. There is no evidence in that testimony upon which any quasi-judicial tribunal could base a

finding that these transportation fares cause such dissatisfaction among employees as to impede the war effort.

Another important phase of the evidence regarding the dissatisfaction of employees is Exhibit No. 19 (R., pp. 966-7), which shows that more than thirty-three per cent of the employees rode on the buses of the Virginia companies, notwithstanding the fact that the fare on the buses of the Capital Transit Company was five cents less. If the employees were so dissatisfied over fares, clearly a third of them would not pay 10 cents when the same ride could be had for 5 cents.

In the beginning of the argument on this point we asserted that on the record we proved affirmatively that the transportation fares were not a major cause of dissatisfaction. This proof is in two parts. First, it is in two official publications (Exhibits 99 and 100). The witness Franklin, statistician in the Office of the Secretary of War, identified an official publication of the War Department entitled "Statistics on Civilian Personnel" for May, 1943, (Ex. 99, R. p. 1033) and for June, 1943, (Ex. 100, R. p. 1036) published under the supervision of the Department's Director of Civilian Personnel and Training.

These official statistics of the War Department on civilian personnel for the months of May and June, 1943, which are the months to which the Department witnesses directed their attention, contain specific statements as to the "Reasons given by employees for desiring separation". (R., pp. 1036, 1040). These exhibits show that out of 1,050 employees separated in May, only 7 assigned transportation as the reason, although transportation was the second item on the form, which contained 25 items (R. p. 1036); and that in June, out of 1,385 employees separated, only 10 assigned transportation as the reason (R. p. 1040). Furthermore, both Exhibit 99 and Exhibit 100 contain a narrative paragraph discussing "Reasons for Separations", and in neither Exhibit is transportation mentioned among the principal factors (R., pp. 1034, 1037).

The other phase of the evidence on the point is in the questionnaires which were distributed to War Department employees. As we have already stated, the questionnaires were distributed to employees at the Virginia installations and a sample was introduced as Exhibit 33 (R. p. 979-80). Some 25,000 of these questionnaires were returned. The questionnaire begins with a statement "Your personal welfare demands that you fill out and return the following questionnaire at once to your supervisor". It contained a blank space for "Comments on bus service" (R. p. 980). Counsel for the companies demanded that the questionnaires be brought to the hearing for their examination. After the questionnaires had been examined by counsel for the companies, counsel for the War Department stipulated that a majority of the people making any comment upon the bus service said that it was "good" or better, and that there were very few, "a tremendously small number", "an insignificant number", who mentioned the fares (R. p. 614-616).

Thus the evidence from the official publications of the War Department, showing statistically the results of interviews with employees who were separating from the service, showed that a wholly insignificant number (17 out of 2,435) gave transportation as the reason for leaving, and further, that when the employees were told that their personal welfare demanded that they fill out a questionnaire, and were specifically asked to "comment" and 25,000 did fill them out, "an insignificant number" even mentioned the fares and the majority of the comment was complimentary to the bus service. We again assert that this evidence affirmatively proves that the transportation fares are not a major cause of dissatisfaction among these employees.

These charges by counsel for the War Department, and this finding by the Commission that the fares of these companies impede the war effort is not an unimportant recitation. It is the mainspring of the order in this case. And,

more important, it is a serious reflection upon companies and officials who have been striving to solve a difficult transportation situation which they did not create but which was created by this very Department in the face of written warning as to what was being done. The finding of the Commission is without substantial evidence; it is without a scintilla of evidence; it is directly contrary to uncontroverted official evidence.

VII.

No Legal Basis is Shown for a Reduction in Fares.

The orders of the Commission not only assert jurisdiction but also reduce the fares.

The Court will have difficulty in finding in the reports of the Commission (R. pp. 835-851; 813-825) the basis for the reduction in the fares. As we analyze the reports, the only basis stated is in the first report, as follows (R. p. 850):

> "The persons using this service, like others who utilize public vehicles, are, for the most part, in a relatively low income class. The record warrants the conclusion that the existing charges are higher than they should reasonably be called upon to bear. It is elementary that value of the service, ability to pay, or what the traffic will bear, is an element properly entering into the fixation of reasonable transportation charges. We know of no reason why that principle is not applicable here."

We note what seems to us to be a curious identification of ideas in the foregoing quotation. Value of service, ability to pay and what the traffic will bear are made synonymous as one "element" and one 'principle", and are integrated with the income status of the customers as a measure of reasonable charges.

No definition or explanation is given as to what is a "relatively low income group". These customers are government employees, paid on scales fixed by Congress and the

Civil Service Commission. Curiously enough, their employer, the United States government, complains that they are insufficiently paid. We do not know how regulatory commissions are to determine the income status of customers, if that becomes a principle of rate-making.

No finding is made as to inadequate or unsatisfactory service as such, or in relation to the fare paid. The only finding as to costs, as we have already said, is that the cost to the Capital Transit Company is 5 cents per passenger per trip, without including any return on the investment, and the fare is only 5 cents. There is no evidence whatever of any nature upon which a valid finding could be made that the existing rates are unjust or unreasonable. The Commission must act upon evidence.

Appellees insist that the Court will not find in the reports of the Commission in this case any finding or statement which ever has been, or ever can be, accepted as a principle upon which transportation fares can be reduced by regulatory authority. The Commission itself said in *Stuart* v. *N. and W. Ry. Co.*, 191 I. C. C. 13, 18, that the applicability of rates "is not dependent on the ability of the shipper to pay."

VIII.

APPELLANTS' BRIEFS.

We have addressed the foregoing argument directly to the validity of the Commission's orders. But it seems proper that as Appellees we make comment on the briefs filed by Appellants, pointing out some of the difficulties encountered by them in attempting to sustain their position.

1. At the bottom of page 27 of its brief, in presenting its views on the statutory requirement for Joint Boards in complaint cases, the Appellant United States finds a necessary premise to be that the letters of the Secretary of War, which initiated these proceedings, were not a complaint "but were at most an expression of dissatisfaction with

existing rates and a request for an investigation." Puzzling over what a complaint could be other than an expression of dissatisfaction and a request for an investigation, we note that the United States says that the letters were not a complaint "in any formal or technical sense". Thus the argument seems to be that if a document filed with the Commission contains an expression of dissatisfaction with rates and a request for an investigation, nevertheless there are additional "formal or technical" requirements the absence of which permits the Commission to exclude Joint Board consideration. The United States does not describe these requisite formalities and technicalities. But its argument makes clear that its whole position as to the Joint Board question rests not upon substance but upon some undefined formality or technicality as to what it deems a complaint under the statute.

The United States also says (Br. p. 28) that "The hearing was described at the outset by the presiding Commissioner as 'an investigation instituted at the request of the Secretary of War into the reasonableness and lawfulness' of certain interstate fares." The argument is not completely candid. The presiding Commissioner did make the statement quoted (R. p. 2) in opening the proceeding, but a few minutes later he put into the record (R. p. 10) a letter which he, as the officer to whom the case has been assigned, wrote the War Department, stating, "Since this investigation was instituted at the request of the War Department, which alleged that the existing fares were excessive, it is in the nature of a complaint * * *." He stated that that letter "has been approved by the entire Commission" (R. p. 10). He thereupon directed the War and Navy Departments to proceed with the presentation of evidence, as is the custom in complaint cases.

2. The United States bases its argument as to the applicability of the national transportation policy upon two premises (Br. pp. 23-25).

It argues that the alleged dissatisfaction of employees shows the unreasonableness of the rates. We have already discussed that proposition; (a) no such dissatisfaction is shown by the evidence, and (b) even if shown, mere dissatisfaction of patrons is not a legal basis for the reduction of rates.

It then argues (Br. p. 25) that fundamentally if the maintenance of economical mass transportation service to important war centers "is *within the purview* of the national transportation policy", the Commission properly took jurisdiction. The statute shows the fallacy of the proposition. The statute says (Sec. 203(b)7(a)) "to the extent that the Commission shall from time to time find that such application *is necessary* to carry out the national transportation policy * * *." The word which gives federal jurisdiction is the word "necessary". Federal regulation must be "necessary". Facts make necessity. The statute pointedly and unmistakably does *not* say that federal regulation shall apply *wherever* employees move to war centers. A factual necessity must exist to confer federal jurisdiction. No such necessity exists in the instant case, as the record clearly shows.

Perhaps a better test of the meaning of the statute comes from a consideration divorced from war atmosphere. The statute refers to "commerce" and to the "postal service" equally with national defense in the definition of the national transportation policy (Act of Sept. 18, 1940, c. 722, Title I, sec. 1, 54 Stat. 899). Let us visualize employees traveling to and from a post office, or to and from a place of commerce. The statute does not say that fundamentally the Commission could properly take jurisdiction over the local transportation fares there involved merely because the postal service and commerce are within the purview of the policy. It says that such federal regulation must be *necessary*. The same rule applies in the case at bar.

The Appellant Commission advances a third premise on the point. It argues that the fares "were regarded as ex-

cessive" by high Government officials (Br. p. 27), that these officials "considered" that Commission jurisdiction over the fares was necessary to the war effort, and it says, "It is apparent that, in order to be of that opinion, such officials need not have had before them facts and figures showing that the war effort was being materially affected." (Br. pp. 27 and 57.) It argues that the Commission is authorized and expected "to *anticipate* any such material hampering of the Government's war work" (Br. p. 58).

The argument is subtle. Its end result spells its fallacy. In substance it is that if high Government officials, without facts or figures, "consider" transportation fares to be excessive, even though war work (or commerce or the postal service) has not been materially hampered, federal regulation is *necessary;* in the absence of facts but in the presence of the opinion of high government officials, the Commission may "anticipate". We cannot find any such doctrine in the statutes or in the cases. A factual necessity for federal jurisdiction must be shown.

3. Curious inconsistencies between different sections of the briefs appear. In arguing that the Commission orders do not in any manner regulate intrastate transportation, the United States says, "The only rates regulated by the present order are those in interstate commerce" (Br. 37). This seems to mean that, in the view of that Appellant, the Commission has established interstate rates quite separately and apart from the intrastate rates already in effect; it has not regulated in any manner fares for intrastate commerce; it has established 10 cents cash, 8⅓ cents tokens and a $1.25 pass as interstate fares for the Capital Transit. Under that view, the identity of the interstate fares and the intrastate fares of Capital Transit is a coincidence. And so they must be, to support the argument of the United States that the Commission has not in any manner regulated intrastate fares.

But when the same Appellant comes to argue that the Commission has not prescribed commutation fares, it says

(Br. 39), in respect to Capital Transit, "The order simply provides that the existing fares shall apply to the transportation here involved." The existing fares are intrastate. (We assume that Appellant did not mean to include the additional 5-cent fare to the Pentagon now existing.) So in this argument Appellant says that the Commission has not prescribed 8⅓ cents tokens or $1.25 pass, it has merely enlarged the application of existing intrastate fares.

The two arguments when placed in juxtaposition vivify the dilemma of Appellants. Either the Commission has prescribed 8⅓ cents tokens and a $1.25 pass as an interstate fare, in which case it has prescribed a commutation fare in violation of its authority under Sections 217(b) and 22; or it has ordered that intrastate fares be expanded to cover extra-District transportation, in which case it has violated the proviso in Section 216(e).

4. Another curious argument is made by Appellants in regard to the requirement of the Commission that Capital Transit expand its District fares to include the Pentagon (Br. of U. S. p. 43; Br. of I. C. C. p. 48). The argument is that since the *average* distance traveled by Pentagon employees is less than the *maximum* traveled by intra-District passengers, therefore, the fare charged the latter is reasonable for the former. Any such doctrine, if established as a rule of regulation, would destroy almost all suburban zone systems of fares. The *average* distance traveled by persons living in a city of any size and working in a suburb is almost always less than the *maximum* possible to be traveled by a person inside the city. In other words, the *average* city trip plus the usual first suburban zone is usually less than the *maximum* possible city trip.

The validity of zone fares cannot be tested by a comparison of *averages* with *maxima*. It must be tested by a comparison of average with average.

In the instant case employees traveling from points in the District to the Pentagon travel an average of 6.21

miles, of which 2.6 miles[21] is in the District, between the points of origin and the downtown bus termini. Since these termini are in the midst of the downtown government buildings in the District, it seems fair to assume that employees in those buildings travel the same average distance, i.e., 2.6 miles to and from their points of origin. Thus, it is clear that the average ride of a Pentagon employee is 6.21 miles and the average ride of a government employee in downtown Washington is 2.6 miles. The former is 2.4 times the latter. If distance is to be the criterion of fares in a zone system, average distances must be used, and on that principle the Pentagon fare should be 2.4 times the District fare.

5. The Appellant Commission repeatedly states that through routes are already in effect between the companies (Br. pp. 40, 41, 42, 74, 91, 92, 94, 96). The Appellant United States is more circumspect in its language on the matter. It says (Br. p. 37), "Through routes *in a practical sense* were in effect;".

There is not one word of evidence in the record to the effect that through routes exist between the bus companies. And there could be no such evidence because there are no through routes.

In the latter part of the Appellant Commission's brief the basis for these repeated statements is spelled out (Br. pp. 96-100), largely in a footnote. The Commission says that the fact that thousands of people travel daily from their homes in the District to their places of work at the Virginia installations creates through routes between the different companies whose facilities these people use.

The facts have been repeatedly stated. These employees move from their homes to downtown Washington along with hundreds of thousands of other people similarly bound downtown, and pay a District fare for this intra-District

[21] Exhibit 12, R. p. 960, shows that the distance from the termini to the Pentagon is 3.6 miles. The remainder is 2.6 miles.

service. They then board a bus of another separate and independent company and pay another fare for the interstate ride to their place of employment. The only "through" feature of the transportation is in the individual's mind and purpose.

Thousands of persons daily travel from their homes in the District by taxicab to Union Station and thence by the Pennsylvania Railroad to New York. Are the taxicabs on "through routes" with the railroad? Thousands of people travel daily by bus or car from points in New Jersey to the Hudson River ferries, thence by subway in Manhattan to their places of work. Are the ferries, by virtue of that fact alone, on "through routes" with the subways? So in Chicago, where the railroads run dozens of trains daily northshore into Wisconsin. The doctrine proposed by Appellants would give jurisdiction to the Commission over the local intra-city fares paid by the patrons in all these and similar instances. It would indeed be a revolutionary innovation in local-federal relationships.

Appellants project as an analogy a freight shipment on a single through bill of lading. The inappropriateness of the analogy is evident. These passengers do not travel on through tickets.

6. In regard to Capital Transit District fares, the Appellant Commission makes the following argument (Br. of I. C. C. p. 48):

> "With respect to these considerations the Commission says that it is unable to accept the contention of the carriers that a proper demarcation line for the application of District zone fares is the mere political boundary between the District and Virginia, and it concludes that the Virginia installations just beyond the boundary should reasonably and properly be included within the District area or base zone."

Apply the same reasoning to New York City. The Commission might refuse to accept the Hudson River as the proper demarcation line for the application of the 5-cent

New York City fare, and conclude that New Jersey installations just across the line should be included in the New York City base zone.

The fact in the case at bar is that Congress itself determined that the District of Columbia, as a political or geographic entity, should be a unit for fare-making. The demarcation is not a mere contention of the carriers.

In its Act of March 3, 1913 (37 Stats. 974; Sec. 43-306, D. C. Code, 1940 Ed.) Congress created a public Utilities Commission of the District of Columbia, and gave it jurisdiction over all public utility rates within the District. It provided, "This section (the P. U. C. Act was Section 8 of an Appropriation Act) shall apply to the transportation of passengers, freight or property from one point to another within the District of Columbia * * *" (par. 1). And it provided, "That the commission shall value the property of every public utility within the District of Columbia * * *" (par. 7). And it further provided, "That every public utility shall file with the commission * * * schedules * * * showing all rates, tolls and charges * * * for any service performed by it within the District of Columbia * * *" (par. 24). And also, "That it shall be unlawful for any public utility to charge, demand, collect or receive a greater or less compensation for any service performed by it within the District of Columbia, or for any service in connection therewith, than is specified in such printed schedules, * * *" (par. 30). And again, "That whenever * * * the commission shall find that any rate, toll, charge, regulation or practice of any public utility within the District of Columbia is unreasonable or discriminatory, it shall have the power to regulate, fix and determine the same as provided in this section" (par. 88.).

Thus Congress created a unit for utility regulation and fixed its limits at the boundary lines of the District. It is surprising to find the Interstate Commerce Commission characterizing the situation as a "contention of the carriers", and announcing that it is unable to accept the bound-

aries of the District as the "proper demarcation line for the application of District zone fares". If the Commission disagrees with Congress on the subject, we respectfully submit that the matter is one neither for the Commission nor for the Courts, but is one for Congress.

An important connotation to the District statute just cited should be noted. Paragraph 30, as quoted, provides that it shall be unlawful for a utility to charge for service performed within the District either more or less than the rate fixed in its schedules or determined by the District Commission. Thus Capital Transit must, by requirement of the statute, charge the full District fare for service within the District. The order of the Interstate Commerce Commission would, therefore, necessarily mean that Capital Transit must carry Pentagon passengers from the District Line to the Pentagon for no charge at all. The full fare collected under the I. C. C. order, being the District fare and no more, would be received, by statutory requirement, for the service within the District. The point illustrates the complete chaos which ensues when the Interstate Commerce Commission attempts to lay a heavy hand on a situation already meticulously regulated by Congressional and State enactment, and attempts to apply to local mass transportation the principles applicable to national interstate transportation problems.

In the foregoing comment we have not attempted an exhaustive analysis of all of the arguments of the Appellants, nor have we referred to mere dicta in the briefs. The few select portions which we have discussed in this section of our brief are major premises to the Appellants' argument. If these premises will not stand analysis, the entire position of Appellants likewise fails.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX.

Interstate Commerce Act.

Part I.

Section 22. Restrictions.

"Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this chapter shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this chapter shall be construed to prohibit any common carrier from establishing by publication and filing in the manner prescribed in section 6 of this title reduced fares for application to the transportation of (a) personnel of United States armed services or of foreign armed services, when such persons are traveling at their own expense, in uniform of those services, and while on official leave, furlough, or pass; or (b) persons discharged, retired, or released from United States armed services within thirty days prior to the commencement of such transportation and traveling at their own expense to their homes or other prospective places of abode; nothing in this chapter shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the free carriage, storage, or handling by a carrier of the household goods and other personal effects of its own officers

or employees when such goods and effects must necessarily be moved from one place to another as a result of a change in the place of employment of such officers or employees while in the service of the carrier, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; nothing in this chapter shall be construed to prohibit any common carrier from carrying any totally blind person accompanied by a guide or seeing-eye dog or other guide dog specially trained and educated for that purpose at the usual and ordinary fare charged to one person, under such reasonable regulations as may have been established by the carrier: *Provided,* That no pending litigation shall in any way be affected by this chapter: *Provided further,* That nothing in this chapter shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this chapter, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section 6 of this chapter; and all the provisions of said section 6 relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section 6. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a

greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section 10 of this chapter shall apply to any violation of the requirements of this proviso. Nothing in this chapter shall prevent any carrier or carriers subject to this chapter from giving reduced rates for the transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the Commission (with or without a hearing); but in any such order the Commission shall (1) define such section, (2) specify the period during which such reduced rates are to remain in effect, and (3) clearly define the class or classes of persons entitled to such reduced rates: *Provided*, That any such order may define the class or classes entitled to such reduced rates as being persons designated as being in distress and in need of relief by agents of the United States or any State authorized to assist in relieving the distress caused by any such calamitous visitation or disaster. No carrier subject to the provisions of this chapter shall be deemed to have violated the provisions of such chapter with respect to undue or unreasonable preference or unjust discrimination by reason of the fact that such carrier extends such reduced rates only to the class or classes of persons defined in the order of the Commission authorizing such reduced rates." Title 49 U. S. C. A. Sec. 22; Acts of Feb. 4, 1887, c. 104, Part I, § 22, 24 Stat. 387; Mar. 2, 1889, c. 382, § 9, 25 Stat. 862; Feb. 8, 1895, c. 61, 28 Stat. 643; Aug. 18, 1922, c. 280, 42 Stat. 827; Feb. 26, 1927, c. 217, 44 Stat. 1247; Mar. 4, 1927, c. 510, § 1, 44 Stat. 1446; June 27, 1934, c. 847, Title V, § 511, 48 Stat. 1264; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; July 5, 1937, c. 432, 50 Stat. 475; Aug. 25, 1937, c. 776, 50 Stat. 809; Sept. 18, 1940, c. 722, Title I, § 3 (c-e), 54 Stat. 900, 901; Sept. 27, 1944, c. 423, 58 Stat. ——.

Part II.

(Motor Carriers)

Section 203 (b) (7a) (8). Vehicles excepted from operation of law.

"* * * nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in the Interstate Commerce Act, shall the provisions of this chapter, except the provisions of section 204 of this chapter relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each state having jurisdiction; * * *." Title 49 U. S. C. A. Sec. 303 (b); Acts of Feb. 4, 1887, c. 104, Part II, § 203, as added Aug. 9, 1935, c. 498, 49 Stat. 544 and amended June 23, 1938, c. 601, § 1107 (j), 52 Stat. 1029; June 29, 1938, c. 811, §§ 2, 3, 52 Stat. 1237; Sept. 18, 1940, c. 722, Title I, §§ 16, 18, 54 Stat. 919, 920.

Section 205(a). Joint Boards.

"The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any

of the following matters arising in the administration of this chapter with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates, permits, or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; complaints as to violations by motor carriers or brokers of the requirements established under section 204 (a); and complaints as to rates, fares, and charges of motor carriers or the practices of brokers: *Provided, however,* That if the Commission is prevented by legal proceedings from referring a matter to a joint board, it may determine such matter as provided in sec. 17. The Commission, in its discretion, may also refer to a joint board any investigation and suspension proceeding or other matter not specifically mentioned above which may arise under this chapter. The joint board to which any such matter is referred shall be composed solely of one member from each State within which the motor-carrier or brokerage operations involved in such matter are or are proposed to be conducted: *Provided,* That the Commission may designate an examiner or examiners to advise with and assist the joint board under such rules and regulations as it may prescribe. In acting upon matters so referred, joint boards shall be vested with the same rights, duties, powers, and jurisdiction as are hereinbefore vested in members or examiners of the Commission to whom a matter is referred for hearing and the recommendation of an appropriate order thereon: *Provided, however,* That a joint board may, in its discretion, report to the Commission its conclusions upon the evidence received, if any, without a recommended order. Orders recommended by joint boards shall be filed with the Commission, and shall become orders of the Commission and become effective in the same manner, and shall be subject to the same procedure, as provided in the case of orders recommended by members or examiners under section 17. If a joint board to which any matter has been referred shall report its conclusions upon the evidence without a recommended order, such matter shall thereupon be decided by the Commission, giving

such weight to such conclusions as in its judgment the evidence may justify." 49 U. S. C. A. Sec. 305(a); Acts of Feb. 4, 1887, c. 104, Part II, § 205, as added Aug. 9, 1935, c. 498, 49 Stat. 548 and amended June 29, 1938, c. 811, §§ 5-7, 52 Stat. 1237, 1238; Sept. 18, 1940, c. 722, Title I, § 20 (c, d), 54 Stat. 922, 923.

Section 216. Rates, Fares and Charges. (49 U. S. C. A. Sec. 316; Acts of Feb. 4, 1887, c. 104, Part II, § 216, as added Aug. 9, 1935, c. 498, 49 Stat. 558, as amended June 29, 1938, c. 811, § 16, 52 Stat. 1240; Sept. 18, 1940, c. 722, Title I, § 22(b-d), 54 Stat. 924.)

"(a) Duty to establish reasonable rates, etc.; service and equipment; rules and regulations; reasonable divisions of joint fares. It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers in interstate or foreign commerce; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and to the issuance, form, and substance of tickets, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce; and in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

* * * * * * * * * *

"(c) Through routes and joint rates. Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or

charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

"(d) Undue preferences or prejudices prohibited. All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

"(e) Complaints to and investigation by commission; power of commission to fix reasonable rates, regulations, etc. Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express,

and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated: *Provided, however,* That nothing in this chapter shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."